Supreme Court, U.S.
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No. 94 464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner

v.

THE NORTH CAROLINA RAILROAD COMPANY,
Respondent

Petition For A Writ Of Certiorari
To The Court Of Appeals
Of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED

Do the Interstate Commerce Act, and abandonment decisions of the Interstate Commerce Commission thereunder, preempt and preclude a state court's jurisdiction to determine where and whether the rail line of an interstate rail carrier must connect with the line of another railroad, if abandonment permitted by the Commission has severed a connection that may have previously existed between the lines?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS OF NORTH CAROLINA

North Carolina Railroad Company

City of Charlotte, North Carolina

Norfolk Southern Railway Company

Norfolk Southern Railway Company's parent corporation is Norfolk Southern Corporation.

Norfolk Southern Railway Company's non-wholly-owned subsidiaries are:

High Point, Randleman, Asheboro and Southern Railroad Company

Mobile and Birmingham Railroad Company

Norfolk and Portsmouth Belt Line Railroad Company

The North Carolina Midland Railroad Company

The South Western Rail Road Company

State University Railroad Company

Yadkin Railroad Company

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
BASIS FOR JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWING THE WRIT	6
CONCLUSION	17
APPENDIX A	1a
APPENDIX B	3a
APPENDIX C	12a
APPENDIX D	16a
APPENDIX E	20a
APPENDIX F	26a
APPENDIX G	32a
APPENDIX H	35a

TABLE OF AUTHORITIES

CASES

Alabama & Vicksburg Railway Co. v. Jackson & Eastern Railway Co., 271 U.S. 244 (1926) 10

Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945) 9

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 13

Central New England Railway Co. v. Boston & Albany Railroad Co., 279 U.S. 415 (1929) 11

Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) . . . 6-9, 15

Colorado v. United States, 271 U.S. 153 (1926) 16

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) 9

Hayfield Northern Railroad Co., Inc. v. Chicago North Western Transportation Co., 467 U.S. 622 (1984) 12

Illinois Central Railroad Co. v. De Fuentes, 236 U.S. 157 (1915) 10

Missouri Pacific Railroad Co. v. Stroud, 267 U.S. 404 (1925) 13

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, art. I, § 8, cl. 3 2

U.S. Constitution, art. VI, cl. 2 2-3

28 U.S.C. § 1257 2

28 U.S.C. § 2321(a) 5

49 U.S.C. § 10501 3

49 U.S.C. § 10901 13

49 U.S.C. § 10903 . . . . . 3, 13

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No.

NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER

v.

THE NORTH CAROLINA RAILROAD COMPANY,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

Petitioner Norfolk Southern Railway Company respectfully submits this Petition for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals of North Carolina.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 112 N.C. App. 762, 437 S.E.2d 393 (1993). The order of the North Carolina Supreme Court dismissing petitioner's appeal and denying discretionary review is reported at 336 N.C. 608, — S.E.2d — (1994). It is final.

BASIS FOR JURISDICTION

The order of the North Carolina Supreme Court dismissing petitioner's appeal and denying its petition for discretionary review was entered June 16, 1994. The opinion and judgment of the North Carolina Court of Appeals from which review is sought was entered December 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Interstate Commerce Clause, art. I, § 8, cl. 3:

> [Congress shall have the Power] To regulate Commerce . . . among the several States . . .;

and the Supremacy Clause, art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

> and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The statutory provisions involved are the Interstate Commerce Act, of which the pertinent statutes are 49 U.S.C. §§ 10501 and 10903, set out in relevant part at App. 35a-38a.

STATEMENT OF THE CASE

In 1991 petitioner filed with the Interstate Commerce Commission (the "Commission") a Notice of Exemption for abandonment of a 0.13-mile section of disused rail line in downtown Charlotte, North Carolina. The abandoned section lay at the northern terminus of a rail line owned by petitioner. Proceeding northward from petitioner's terminus, tracks crossed Second Street. From Second Street, respondent owns a rail line that extends northeast across the state of North Carolina. The abandonment severed an earlier track connection between the two lines; petitioner's line still connects with respondent's line north of Charlotte.[1] App. 25a.

On July 16, 1991, the Commission ordered that the abandonment would be effective August 30, 1991. The abandoned section ran across a tract of land owned in fee by petitioner. In conjunction with the abandonment, and as part of an agreement with the City of Charlotte, petitioner deeded the tract of land to the City.

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[1] Respondent's entire railroad line was leased to petitioner under a 99-year lease that will expire on December 31, 1994. At present, petitioner conducts all rail operations on respondent's line, and respondent conducts no rail operations.

Respondent filed a petition to reopen the Commission's proceeding and revoke the abandonment on December 10, 1991. On the same day, respondent commenced this action by filing a complaint in the Superior Court of Mecklenburg County, North Carolina. The complaint sought a declaration of the parties' rights and obligations with respect to the tract that petitioner had conveyed to the City, and also with respect to petitioner's line of railroad generally. Respondent asked the state court to declare: That respondent had express or implied contracts with petitioner and the City to maintain a "continuous through track connection"[2] between respondent's line and petitioner's line; that the tract of land petitioner had conveyed to the City was subject to express, implied or equitable easements in respondent's favor; and that respondent was a third-party beneficiary of the contract for sale of the tract of land by petitioner to the City. App. 29a-30a.

On February 18, 1992, the Commission denied respondent's petition to reopen the abandonment proceeding or revoke the abandonment. The Commission found that petitioner "did not obligate itself to connect with respondent

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[2] This phrase, which appears in a 1968 lease agreement and accompanying Memorandum of Lease between the parties, is the sole basis for respondent's assertion that petitioner has an express obligation to connect its line with respondent's line. The parties vigorously disagree about the proper interpretation of this phrase. Although it is outside the scope of the present petition to seek proper construction of the phrase, it is instructive that the Commission did construe the phrase, and found that petitioner had *not* thereby obligated itself to connect with respondent's track.

or to maintain a right-of-way." App. 24a. Respondent did not appeal the Commission's decision to the federal Court of Appeals under the procedure provided in 28 U.S.C. § 2321(a).

On May 4, 1992, the Mecklenburg County Superior Court heard all motions pending in the state-court action at that time. In an order dated May 19, 1992, the court denied petitioner's motion to dismiss for lack of subject-matter jurisdiction, and denied petitioner's motions to dismiss the action for failure to state a claim on which relief could be granted. The court granted petitioner's motions for summary judgment on respondent's requests for declarations of express contract and express easement, but denied summary judgment against respondent with respect to its claims of an "easement implied by reservation," an "equitable servitude in the nature of a railroad right of way," and implied contracts to maintain a railroad connection or corridor. App. 12a-15a.

Petitioner appealed the trial court's denial of its motion for dismissal for lack of subject-matter jurisdiction to the North Carolina Court of Appeals. In an opinion dated December 7, 1993, the Court of Appeals affirmed the Superior Court's denial of petitioner's motion for dismissal. App. 3a-11a. Petitioner then filed a notice of appeal and petition for discretionary review with the Supreme Court of North Carolina. The North Carolina Supreme Court, by an order entered June 16, 1994, dismissed petitioner's appeal and denied its petition for discretionary review. App. 1a-2a.

How the Federal Question Was Raised: At the motions session of Mecklenburg County Superior Court, which was the sole trial-court proceeding in this case, petitioner raised the issues of preemption and res judicata or

collateral estoppel as bases for dismissal for lack of subject-matter jurisdiction. App. 32a-34a. This motion was denied by the Superior Court. App. 14a. Petitioner again asserted the preemption and res judicata or collateral estoppel issues as Assignments of Error in the Record on Appeal to the North Carolina Court of Appeals, and argued these assertions in its Defendant-Appellant's Brief to that court. The North Carolina Court of Appeals acknowledged petitioner's arguments that the trial court improperly assumed jurisdiction, in view of the Commission's preemption of state authority to dictate the trackage or service obligations of an interstate rail carrier. The Court of Appeals held, however, that the case below "turn[ed] on state law construction of written instruments ... while the I.C.C. ruling applie[d] to the abandonment of the railroad." App. 8a-9a. The court did not explain the basis for its distinction. Petitioner again raised the preemption and preclusion issues in its Notice of Appeal and Petition for Discretionary Review to the North Carolina Supreme Court.

REASONS FOR ALLOWING THE WRIT

The decision of the North Carolina Court of Appeals, if not corrected by this Court, will result in State-supported violation of the Interstate Commerce and Supremacy Clauses of the United States Constitution. Under this decision, an interstate rail carrier could pursue and receive authorization from the Interstate Commerce Commission to abandon a line of railroad, yet still be subject to a putative duty under state law to maintain a track connection for the benefit of a state-court claimant. The decision directly conflicts with the well-established case law of this Court, and in particular with the ruling law stated in *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311

(1981). If allowed to stand, North Carolina and other States will feel free to ignore Commission orders on the pretext that state law of contracts and property permits independent state-law jurisdiction over railroad matters that have always been held to be within the Commission's exclusive jurisdiction.

In *Kalo*, an interstate rail carrier had been granted Commission approval for its abandonment of a branch line. The single shipper served by the branch line filed a complaint in Iowa state court, seeking damages under state law for the railroad's refusal to provide service and track maintenance on the abandoned line. The trial court dismissed the claim as preempted by the Interstate Commerce Act, but the Iowa Court of Appeals reversed. That court held that federal and state law did not conflict with each other, but rather complemented each other in providing relief for parties allegedly affected by abandonments. The Iowa Supreme Court denied review, and this Court granted certiorari.

Reversing the Iowa Court of Appeals, this Court held in *Kalo* that the Interstate Commerce Act and Iowa law were in fundamental conflict with respect to subject matter over which Congress had given the Commission exclusive jurisdiction. The Commission has "plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, this authority is exclusive." 450 U.S. at 323. Such authority must preempt any state-court holding, like that of the Iowa Court of Appeals in *Kalo*, that claims for failure to maintain track and right of way on a line abandoned with Commission approval are "properly cognizable in the state courts." 450 U.S. at 324.

In the present case, respondent's complaint demands that North Carolina's state courts declare that petitioner has a contractual obligation to maintain a "continuous through track connection between NCRR's line and NS' line." Since the abandoned section had connected with tracks that continued onto respondent's right of way,[3] any declaration purporting to impose a duty to connect track or right of way would require that petitioner maintain track and railroad right of way precisely where the Commission had approved abandonment.

The North Carolina Court of Appeals purported to find a distinction between "state law construction of written instruments" and Commission authority for "abandonment of the railroad." App. 8a-9a. As this Court emphasized in *Kalo*, however, federal preemption is not subject to defeat by immaterial distinctions:

> It is true that not one of the three counts of respondent's state-court complaint mentions the word "abandonment," but compliance with the intent of Congress cannot be avoided by mere artful pleading. It is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a

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[3] The parties dispute the location of respondent's southern terminus. Respondent contends it lies on the southern margin of Second Street, and thus was coterminous with petitioner's pre-abandonment northern terminus; petitioner contends that respondent's southern terminus is on the northern margin of Second Street. The distinction is not relevant for the present purposes, because it is not disputed that tracks that previously crossed Second Street connected the parties' rights of way.

> disappointed shipper to gain from the Iowa courts the relief it was denied by the Commission.

450 U.S. at 324. In the present case, it is difficult to avoid the conclusion that respondent retained petitioner as a party in the state-court litigation in an attempt to have the North Carolina courts undo the Commission's authorization for petitioner's abandonment of its former track in Charlotte.

It is immaterial, moreover, that the present action is one for declaratory relief, rather than damages as in *Kalo*. It is proper for this Court to review state-court declaratory judgment actions when the state courts incorrectly decide, or fail to consider, the issue of federal preemption. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 12 n.12 (1983); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 471 (1945).

At no stage of the proceedings below has respondent specified how the relief it seeks can be ordered without requiring petitioner to do what the Commission has excused petitioner from doing. In fact, respondent's demand that an interstate rail carrier provide "a continuous through track connection" with petitioner necessarily implicates the duty to provide a track connection between the two railroads at some point. The North Carolina courts' acceptance of jurisdiction to declare rights of access over petitioner's rail line to all points on the line, and to all further connections the line may reach, amounts to usurpation of exclusive Commission jurisdiction.

This Court's protection of Commission jurisdiction has a history almost as long as the history of the Interstate Commerce Act itself. *Kalo*, 450 U.S. at 318. In *Illinois Central Railroad Co. v. De Fuentes*, 236 U.S. 157 (1915), Louisiana's state railroad commission had issued an order requiring all railroad companies operating in that state to switch cars with any connecting railroad. This Court noted that "physical connections exist between appellant's tracks and the lines of competitive railroads leading therefrom to many states; if [the order] is enforced, its switch tracks will be subjected to use by such railroads. . . ." 236 U.S. at 162. This Court held that Louisiana had exceeded its powers, because it was attempting to regulate a subject preempted by Congress.

In *Alabama & Vicksburg Railway Co. v. Jackson & Eastern Railway Co.*, 271 U.S. 244 (1926), Jackson & Eastern sought to connect with Alabama & Vicksburg, an interstate railroad, by means of a state eminent domain proceeding. Jackson & Eastern did not have Commission approval for the connection. This Court held:

> [T]he establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction.

271 U.S. at 250. This Court held that Mississippi's Supreme Court had erred in concluding the Commission lacked exclusive jurisdiction over junctions between interstate railroads, or that Mississippi's presumption of power to

govern such junctions did not unduly burden interstate commerce.

Respondent has persistently asserted that the obligations it seeks to impose on petitioner are wholly outside the scope of Commission regulation. As this Court has recognized, Commission authority over a carrier's right of way diminishes or ceases after abandonment, and carriers might have post-abandonment contractual obligations and property rights that are justiciable as matters of ordinary contract and property law. This Court has never suggested that the state courts could use such matters as the bases for exercise of parallel jurisdiction with the Commission, much less an excuse effectively to reverse an abandonment authorized by the Commission.

In *Central New England Railway Co. v. Boston & Albany Railroad Co.*, 279 U.S. 415 (1929), the owner of a branch line had a contract with another railroad for operation over the second railroad's line. The first railroad was obligated to pay $15,000 per year for the operating rights. After the first railroad abandoned its branch line with Commission approval, it discontinued payments to the second railroad. The second railroad sued in state court to recover payments due it. The first railroad contended that abandonment necessitated and excused its discontinuance of payments. This Court held that the Commission's abandonment order did not purport to relieve the first railroad of its contractual obligations to make annual payments.

In a more recent opinion, the Court held that the Interstate Commerce Act does not preempt state jurisdiction over rail property after the Commission has authorized abandonment. In *Hayfield Northern Railroad Co., Inc. v.*

Chicago and North Western Transportation Co., 467 U.S. 622 (1984), a carrier had completed abandonment of a section of its interstate rail line. A group of shippers then created a railroad company and exercised the power of eminent domain under Minnesota law for the segment of abandoned line within that state. The Court held that the abandoned line did not remain under the Commission's jurisdiction after abandonment; therefore, the railroad's abandoned right of way and track could properly be subject to taking under a state condemnation proceeding.

In the present case, petitioner had no alleged contractual obligation to respondent that could be imposed independent of the duty respondent alleges to provide a connection between petitioner's line and respondent's line. Nor has petitioner attempted to interpose any objection to respondent's exercising rights it asserts over the abandoned section. Petitioner has conveyed to the City of Charlotte fee title to the land that once underlay petitoner's rail line, and any rights respondent may wish to assert respecting that property must be asserted against the City or its successor in title.

Respondent goes far beyond such assertions, however, in insisting that petitioner is subject to state-court jurisdiction to declare petitioner's obligation to provide a connection between its line and respondent's line at this location. Respondent's demand for a connection between lines means a court must order that (1) the parties' lines must connect somewhere, and (2) such a connection must be located so as to provide respondent with a rail corridor proceeding south

from the southern terminus of respondent's line.[4] If North Carolina courts were free to mandate track connection as respondent has demanded, those courts would have the power to undo an abandonment approved by the Commission under 49 U.S.C. § 10903, by declaring that petitioner must restore its rail line in the abandoned section. Alternatively, if a state court could declare that respondent had the right to extend its own rail line into the abandoned section, the court would be usurping the Commission's exclusive authority to approve a carrier's acquisition, construction or operation of additional or extended rail line. 49 U.S.C. § 10901(a). The North Carolina courts are clearly preempted from any such determinations, because "when Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981), *quoting Missouri Pacific Railroad Co. v. Stroud*, 267 U.S. 404, 408 (1925).

The North Carolina courts are not only preempted; they are also precluded from entertaining litigation about whether petitioner must connect its rail line with respondent's. In *Kalo*, this Court noted that the Commission's abandonment approval "bolstered" the conclusion that federal law preempts state law in the area. 450 U.S. at 326. In *Kalo*, the aggrieved shipper filed suit in state court before the Commission issued its abandonment order. This Court stated:

> Even though the approval did not come until after respondent filed its civil suit, it would be

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[4] As observed by the Commission, NCRR'S line *does* connect with NS's line. This connection is located north of Charlotte. App. 25a.

> contrary to the language of the statute to permit litigation challenging the lawfulness of the carrier's actions to go forward when the Commission has expressly found them to be reasonable.

Id. In the present case, the Commission issued two orders: the first order, based on petitioner's Notice of Exemption, was issued before respondent sued petitioner in state court. The Commission's second order, its decision in response to respondent's petition to reopen Commission proceedings on the abandonment, was issued during the pleadings phase of the state-court action.[5] In the latter decision, the Commission expressly construed the "continuous through track connection" language that respondent relies on, and found that respondent had misconstrued the term:

> We find also that neither NS nor the City assumed any obligation under the terms of the Memorandum of Lease, to maintain a connection with NCRR over the abandoned line. Our reading of the memorandum shows that it deals only with NCRR property and that

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[5] The Commission's decision, entered February 18, 1992, was to become effective February 24, 1992. App. 25a. Both dates were after petitioner was required to, and did, file its answer in state court to respondent's complaint. Petitioner moved to amend its answer to incorporate reference to the Commission's February 18, 1992 decision with respect to res judicata or collateral estoppel, but the trial court denied the motion. App. 14a.

> NS was only obligated to determine a point of connection for a right-of-way so that NCRR could connect with NS. NS did not obligate itself to connect with NCRR or to maintain a right-of-way. NCRR's misinterpretation of the Memorandum of Lease does not provide a basis for establishing changed circumstances to reopen the proceeding.

App. 24a. The Commission found there was no reason to revoke the exemption, and in effect reaffirmed the abandonment over respondent's objection.

Now respondent seeks a state-court declaration that petitioner must provide a connection at the very place where the Commission has authorized abandonment, and for the same reasons rejected by the Commission in its second decision. In *Kalo*, this Court held that the Commission's findings "simply leave no room for further litigation over the matters respondent seeks to raise in state court." 450 U.S. at 327. This was despite the aggrieved shipper's failure to perfect its objection to abandonment before the Commission. In the present case, respondent's post-abandonment petition to reopen or revoke the abandonment actually was considered by the Commission and explicitly rejected. Thus, even more fully than the aggrieved party in *Kalo*, respondent was able to present its case for non-abandonment to the Commission, and to enjoy the adjudicatory consideration which supports application of the doctrine of res judicata. The Commission's decision "simply leave[s] no room for further litigation" over respondent's demand for a track connection between its line and petitioner's line.

On the face of its complaint, respondent imputes to the North Carolina state courts jurisdiction to declare that petitioner must connect its interstate rail line with respondent's line, and more generally to declare respondent's "right, title and interest in . . . the Norfolk Southern railroad line" — a line respondent knowingly identifies as "an interstate railroad line." App. 31a, 27a. The North Carolina courts have erred in asserting such jurisdiction. It is important that this Court grant petitioner's petition for certiorari, because the potential effects of continuing state-court jurisdiction are at best confusion, and at worst subversion of the principle of supremacy of federal law in interstate commerce.

It is well established that a state court may not prescribe interstate rail connections, even if the affected sections of rail line lie completely within the state. *Colorado v. United States*, 271 U.S. 153 (1926). There is nothing in the North Carolina Court of Appeals' cursory analysis of the preemption issue in this case, however, to suggest any restraint on a state court's authority to declare rights and duties of railroads to connect with each other. If, in this case, the abandoned section of rail line had crossed the line between North Carolina and South Carolina, nothing in the law of this case so far would prevent North Carolina jurisdiction from pursuing the connection into South Carolina, there perhaps to conflict with the jurisdiction of that State's courts. It was precisely to avoid such inherent conflicts that the Constitution vested the power to regulate interstate commerce in the federal government. Since the creation of the Interstate Commerce Commission, such conflicts have consistently been avoided in practice by this Court's recognition of the Commission's exclusive and preemptive

authority in matters of rail line abandonments and connections.

The Constitution simply does not permit a state court to require that an interstate rail carrier provide a connection to reattach rail line that has been severed as the result of an abandonment approved by the Commission. Petitioner respectfully submits that it is essential that this Court grant certiorari to prevent such an improper assumption of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 13, 1994

APPENDIX

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 29P94

THE NORTH CAROLINA RAILROAD COMPANY,

v.

CITY OF CHARLOTTE and
NORFOLK SOUTHERN RAILWAY COMPANY,

Appeal from the Court of Appeals of North Carolina

June 16, 1994

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant (Norfolk Southern Railway) in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Plaintiff, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 16th day of June 1994.

s/ Parker, J.
For the Court"

Upon consideration of the petition filed by Defendant (Norfolk Southern Railway) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 16th day of June 1994.

s/ Parker, J.
For the Court"

APPENDIX B

COURT OF APPEALS OF NORTH CAROLINA

No. 9226SC916

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and
NORFOLK SOUTHERN RAILWAY COMPANY,
Defendants

Appeal from the Superior Court of Mecklenburg County

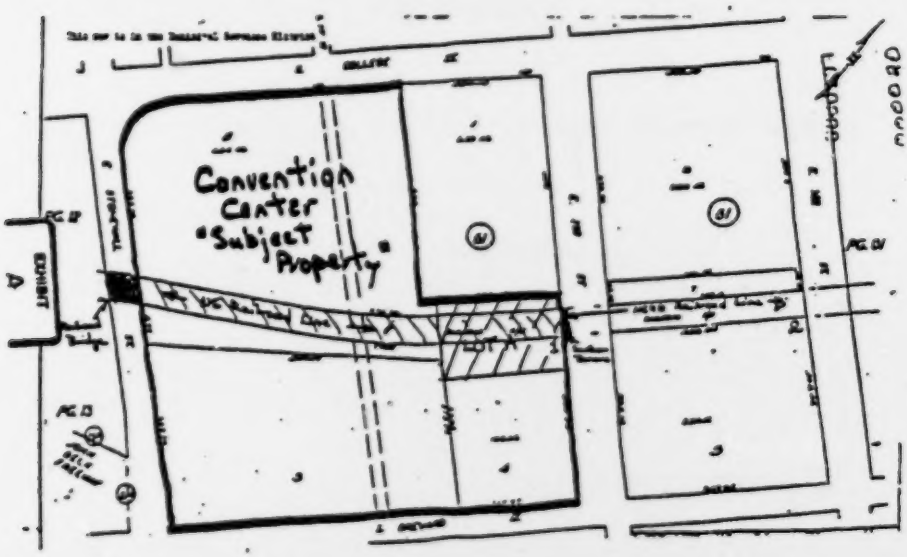
December 7, 1993

JOHNSON, Judge.

This action centers around a right of way dispute between two railroad companies, The North Carolina Railroad Company (NCRR) and Norfolk Southern Railway Company

(NS[1]), as to a tract of land in downtown Charlotte, North Carolina. The facts pertinent to this appeal are as follows:

NCRR owns a railroad line which runs across North Carolina, from Morehead City westward to a southern terminus point in downtown Charlotte. At this southern terminus point, NCRR's railroad line is connected and has connected to the railroad line and corridor owned by NS since the turn of the century. NS' line continues south from that point through the remainder of Charlotte and to points beyond as an interstate railroad line. These two lines connected on a small parcel of land (Lot A) owned jointly by NCRR and NS as tenants in common on the south side of Second Street in downtown Charlotte. Lot A bordered a larger tract of land owned by NS (this larger tract is referred to as the Subject Property). NS' right of way extends southward from Lot A, through the Subject Property.



[1]NS refers to both Norfolk Southern and its predecessor, Southern Railway.

In a document executed in 1895, NCRR leased certain properties to NS for a ninety-nine year period (until 1994). In 1968, the parties executed a new lease agreement pertaining to several of the parcels covered in the 1895 agreement located north of the Subject Property and Lot A. This new lease contained an exception of a forty-foot strip as a right of way for two railroad tracks, and pursuant to the terms of the exception, NS had a surveyor locate this forty-foot strip and it was recorded in the Mecklenburg Registry on 23 December 1971 on a plat entitled "Southern Railway Right of Way."

By the terms of the 1968 lease, NCRR conveyed all of its undivided interest in Lot A to NS by general warranty deed without reservation or condition.

In 1990, NS and the City of Charlotte (City) entered into an agreement for NS to sell the Subject Property to the City as the City planned to build a convention center on the Subject Property. In 1991, the parties amended their agreement to provide that NS seek Interstate Commerce Commission (ICC) approval for abandonment of its line of railroad on the Subject Property. NS filed this notice with the ICC; the ICC responded affirmatively on 16 July 1991, stating the exemption would become effective 30 August 1991.

As a result of this decision, NCRR filed a petition with the ICC, dated 10 December 1991, asking the ICC to reopen consideration of its decision allowing NS to abandon the rail line on the Subject Property. NS filed timely response opposing this petition, and the ICC rendered its decision on 18 February 1992, effective 24 February 1992, denying NCRR's petition.

Also on 10 December 1991, plaintiff NCRR filed a complaint for declaratory judgment in this action in Mecklenburg County Superior Court and served defendants NS and City on 11 December 1991. NS obtained an extension of time to respond, and then filed and served its answer and counterclaim; the City also filed its answer. NS' and the City's answers included motions to dismiss under N.C.R. Civ. P. 12(b)(1) and 12(b)(6).

NS filed a motion for summary judgment against NCRR on 2 March 1992. NCRR filed a motion to dismiss NS' counterclaim under N.C.R. Civ. P. 12(b)(6) on 9 March 1992. City filed a motion for judgment on the pleadings under N.C.R. Civ. P. 12(c) and for summary judgment against NCRR on 22 April 1992.

On 22 April 1992, NS filed a motion for leave to amend its answer and counterclaim, to allege the affirmative defenses of res judicata and/or collateral estoppel.

On 4 May 1992, during the motions session of the action, NS contended in open court that the ICC had exclusive subject matter jurisdiction over the NCRR's claims against NS. A motion by NCRR to stay the hearing pending completion of discovery was denied.

The order entered on 19 May 1992 contained the following rulings: a denial of the City's motion for judgment on the pleadings; a denial of NS' motion to dismiss for lack of subject matter jurisdiction; a denial of NS' and the City's motions to dismiss for failure to state a claim under N.C.R. Civ. P. 12(b)(6); a denial of NS' and the City's motions for summary judgment as to counts 1, 3, 6 and 7 of the complaint; the granting of NS' and the City's motions for

summary judgment as to counts 2, 4, 5 and 8 of the complaint; a denial of NCRR's motion to dismiss NS' counterclaim under N.C.R. Civ. P. 12(b)(6); and a denial of NCRR's motion for leave to amend its answer and counterclaim to allege res judicata and/or collateral estoppel.

NS filed notice of appeal on 26 June 1992, and NCRR filed its notice of cross-appeal on 9 July 1992.

NS first assigns that the trial court erred in denying NS' motion to dismiss for lack of subject matter jurisdiction. NS argues initially that this interlocutory appeal is proper under North Carolina General Statutes 1-277 (1983). This statute states:

> (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.
>
> (b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.

NS argues that the trial court improperly assumed jurisdiction over property of NS, and that "[u]nder N.C.G.S. 1-277(b), it is clearly proper for this Court to consider an appeal from denial of a motion to dismiss, when the motion deals with jurisdiction over property of the appellant." NS further argues that "[t]he trial court's decision also affects a substantial right of NS: the right not to be forced to go to trial when jurisdiction assumed over NS in state court was a nullity. Therefore, immediate appeal is also proper under N.C.G.S. 1-277(a)."

Our Court has stated that "[North Carolina General Statutes 1-277(b)] simply allows a defendant, in an action of this nature, a means of immediate appellate determination as to whether the trial court has jurisdiction so that it can then proceed to answer the questions raised by the lawsuit." Holt v. Holt, 41 N.C. App. 344, 348, 255 S.E.2d 407, 410 (1979). We find that the denial of NS' motion to dismiss for lack of subject matter jurisdiction is properly appealable.

NS argues that "[t]he court below erroneously assumed jurisdiction over NS's property south of the Subject Property. . . . NS's duty to provide interstate rail service on its lines is subject to exclusive jurisdiction of the ICC." NS argues that it is well-established "that the ICC's authority to regulate trackage rights affecting interstate commerce preempts state regulation." NS directs this Court's attention to cases specifically involving claims which involve state jurisdiction over physical joining of lines, use of an interstate trackage and abandonment of existing lines.

The cases which NS cites, however, are distinguishable from the facts in the instant case. The instant case turns on state law construction of written instruments,

specifically the language of the 1968 lease, the 1968 deed and the 1990 contract herein, while the I.C.C. ruling applies to the abandonment of the railroad. We therefore find that the trial court did not err in denying NS' motion to dismiss for lack of subject matter jurisdiction.

NS' next two assignments of error are that (1) the trial court abused its discretion in denying NS leave to amend its answer and counterclaim as to the preclusive effect of the ICC decision, and (2) the trial court erred in denying NS' motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6), because the ICC's decision of 18 February 1992 precludes state court determination of the claims raised in the complaint against NS. For reasons set out in our previous discussion, we need not address these assignments of error.

NCRR cross-appeals and argues that the trial court erred by granting defendant NS' motions for summary judgment on counts 2, 4, 5, and 8 of the complaint. In determining whether we may properly hear NCRR's cross-appeal, we turn to N.C.R. Civ. P. 54(b):

> *Judgment upon multiple claims or involving multiple parties.* — When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In*

> *the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.* Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added.)

In order for a judgment in a multiple claim or multiple party action to be immediately appealable, the judgment must be (1) in effect final as to one or more of the claims or parties; and (2) certified for appeal by the trial judge. If the judgment is final as to one or more of the claims or parties but has not been certified for appeal by the trial court, no appeal will lie unless an immediate appeal is authorized by some other rule or statute, such as North Carolina General Statutes 1-277 or North Carolina General Statutes 7A-27 (1989). Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, disc. review allowed and appeal dismissed, 301 N.C. 92 (1980).

Therefore, the judgment herein, as a multiple claim or multiple party action, and final as to one or more of the claims or parties but not certified for appeal by the trial court, is not appealable unless an immediate appeal is authorized by some other rule or statute. Finding no immediate appeal

authorized by some other rule or statute, and noting that counts 1, 3, 6 and 7 of NCRR's complaint remain, we find NCRR's cross-appeal interlocutory.

We affirm the trial court's decision denying NS' motion to dismiss for lack of subject matter jurisdiction. We dismiss NCRR's cross-appeal as it is interlocutory.

Judges WYNN and JOHN concur.

APPENDIX C

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CvS 17226

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and NORFOLK
SOUTHERN RAILWAY COMPANY,
Defendants.

Filed May 29, 1992

ORDER

This cause came on before the Honorable Claude S. Sitton on May 4, 1992 for hearing on: motions of Defendant City of Charlotte to dismiss the Complaint pursuant to Rule 12(b)(6), for Judgment on the Pleadings pursuant to Rule 12(c), and for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure; motions of Defendant Norfolk Southern Railway Company to dismiss Count 9 of the Complaint for lack of subject matter

jurisdiction pursuant to Rule 12(b)(1), to dismiss the Complaint pursuant to Rule 12(b)(6), for leave to amend its answer and counterclaim pursuant to Rule 15, and for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure; and on motions of the Plaintiff to dismiss the counterclaim of Defendant Norfolk Southern pursuant to Rule 12(b)(6), and to continue the hearing on Defendants' motions for Summary Judgment.

The Court DENIED Plaintiff's motions to continue hearing of the Summary Judgment motions. Plaintiff made exception in open court, and the parties agreed and the Court allowed that the hearing could continue without waiving Plaintiff's exception and objection.

The Court reviewed the record and considered the briefs submitted and arguments made by counsel. Based on the foregoing, it appears to the Court that there is a genuine issue of one or more material facts as to Counts 1, 3, 6 and 7 of the Complaint and that Defendants are not entitled to judgment as a matter of law on those Counts. It further appears to the Court that no genuine issue of any material fact exists as to Counts 2, 4, 5 and 8 of the Complaint and the Defendants are entitled to judgment as a matter of law on those counts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of Defendants City of Charlotte and Norfolk Southern Railway Company for Summary Judgment on Counts 1, 3, 6 and 7 of the Complaint are hereby DENIED and the motions of said Defendants for Summary Judgment on Counts 2, 4, 5 and 8 of the Complaint are hereby ALLOWED. Count 9 of the Complaint was

voluntarily dismissed with prejudice by Plaintiff prior to the hearing.

IT IS FURTHER ORDERED that in light of the Court's ruling on Defendant's Summary Judgment motions, Defendants' motions to dismiss Complaint pursuant to Rule 12(b)(6) and Defendant City of Charlotte's motion for judgment on the pleadings pursuant to Rule 12(c) are DENIED.

IT IS FURTHER ORDERED that Defendant Norfolk Southern's motion to dismiss pursuant to Rule 12(b)(1) is DENIED.

IT IS FURTHER ORDERED that the motion of Defendant Norfolk Southern Railway Company for leave to amend its Answer and Counterclaim is DENIED.

IT IS FURTHER ORDERED that the motion of Plaintiff North Carolina Railroad Company to dismiss Counterclaim of Norfolk Southern Railway Company is DENIED. Plaintiff is allowed twenty days from the date of the entry of this Order to file a reply to the counterclaim.

The parties have agreed that Defendants shall have 30 days after the entry of this Order to serve their responses or objections to Plaintiff's discovery requests.

The parties consent to this Order being executed by the undersigned Judge out of session and out of term.

This the 19th day of May, 1992.

s/ Claude S. Sitton
Honorable Claude S. Sitton
Superior Court Judge Presiding

APPENDIX D

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

[Docket No. AB-290 (Sub-No. 118X)]

NORFOLK SOUTHERN RAILWAY COMPANY--
ABANDONMENT EXEMPTION--
IN MECKLENBURG, COUNTY, NC

Decided: July 16, 1991

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon its 0.13-mile line of railroad between milepost R-0.0, at 2nd Street, and milepost R-0.13, at Stonewall Street, in Charlotte, Mecklenburg County, NC.

Applicant has certified that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected under Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on August 30, 1991 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking statements under 49 CFR 1152.29 must be filed by August 12, 1991.[4] Petitions for reconsideration

---

[2]A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

[3]See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

[4]The Commission will accept a late-filed trail use statement so long as it retains jurisdiction to do so.

or requests for public use conditions under 49 CFR 1152.28 must be filed by August 20, 1991, with:

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

A copy of any petition filed with the Commission should be sent to applicant's representative:

Robert J. Cooney
Three Commercial Place
Norfolk, VA 23510

If the notice of exemption contains false or misleading information, use of the exemption is void ab initio.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by August 5, 1991. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief, SEE at (202) 275-7684. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: July 16, 1991

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

[Docket No. AB-290 (Sub-No. 118X)]

NORFOLK SOUTHERN RAILWAY COMPANY--
ABANDONMENT EXEMPTION--
IN MECKLENBURG, COUNTY, NC

Decided: February 18, 1992

On July 11, 1991, the Norfolk Southern Railway Company (NS), filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 0.13-mile line of railroad between milepost R-0.0, at 2nd Street, and milepost R-0.13, at Stonewall Street, in Charlotte, Mecklenburg County, NC. On July 31, 1991, the notice of exemption was served and published in the Federal Register (56 Fed. Reg. 36,169). The exemption became effective on August 30, 1991.

On December 11, 1991, the North Carolina Railroad Company (NCRR) filed a petition seeing to void, reopen, or revoke the notice of exemption. NS replied on December 20, 1991, and the City of Charlotte (City) filed a verified statement supporting NS on January 13, 1991. On December 30, 1991, NCRR filed a letter-response. We will deny the petition.

DISCUSSION AND CONCLUSIONS

In its petition, NCRR argues that the notice of exemption is void ab initio because it contained false and misleading information, or that it should be reopened due to substantially changed circumstances and revoked pursuant to 49 U.S.C. 10327(g)(1) and 49 U.S.C. 10505(d). Under 49 U.S.C. 10327(g)(1), we may reopen a proceeding when we find substantially changed circumstances, and under 49 U.S.C. 10505(d), we may revoke an exemption when we find that application of a provision of the Interstate Commerce Act (Act) is necessary to carry out the national rail transportation policy (RTP) in 49 U.S.C. 10101a. The party seeking to revoke an exemption has the burden of showing that the revocation criterion of 49 U.S.C. 10505(d) has been met.

We are required to exempt a person, class of persons, or a transaction or service when we find that applying a regulatory provision of the Act is not necessary to carry out the RTP and either the transaction or service is of limited scope, or regulation under the Act is not necessary to protect shippers from the abuse of market power (49 U.S.C. 10505(a)). Pursuant to this authority, we have adopted a class exemption procedure for abandonment of rail lines that, without formal complaint, have not been used for local service for 2 or more years, provided that any overhead traffic on the line can be rerouted (49 CFR 1152.50(b)). If the notice contains false or misleading information, the exemption is void ab initio. NS has met these requirements to qualify for the 2-year out-of-service class exemption for the line in issue here.

NCRR has based its "void ab initio" claim on an article from the December 2, 1991, issue of The Charlotte

Observer (attached as Exhibit No. 1 to its petition), whose author opined that the Stonewall Street Bridge, embraced within the line abandoned, probably was more than 50 years old. NCRR claims that NS failed to bring this bridge, with potential historic significance, to the attention of the Commission's Section of Energy and Environment and the North Carolina Historic Preservation Office as required by 49 CFR 1105.8. Because of this omission, NCRR asserts that the exemption notice is void ab initio, since it contained false or misleading information.

In a letter from NCRR's Legal Counsel filed on December 30, 1991, NCRR has now admitted that its petition is in error on this point. According to the letter, the Stonewall Street Bridge is less than 50 years old and is ineligible for inclusion in the Register of Historic Places. Consequently, we find that the exemption notice is not void ab initio for containing false or misleading information.

In the alternative, NCRR requests reopening of the proceeding because of substantially changed circumstances. NCRR explains that it has leased its rail property to NS under a long term lease but that lease is due to expire in 1994. NCRR would like to preserve the option of itself resuming rail service at that time or engaging another operator and is interested in preserving access to NS across the Stonewall Street Bridge. However, NCRR claims that prior statements made by the City that it would preserve rail corridors, especially including this one, eliminated the need at the time the notice was published for NCRR or other interested persons to make an offer to purchase the subject line or to seek imposition of a public use condition; allowing 6-months time to negotiate acquisition of the right-of-way. NCRR claims that the City's subsequent decision to effectively

destroy the rail corridor by tearing down the Stonewall Street Bridge, after purchasing the right-of-way as part of its plans to build a convention center, has created substantially changed circumstances from its commitment to preserve rail corridors. NCRR adds that the City's purchase of the right-of-way is subject to all outstanding leases, including the one between NCRR and Southern Railway Company (SRC), a corporate predecessor to NS, dated June 16, 1969, requiring that SRC "form and maintain a continuous through track connection" with NCRR. NCRR concludes that the Commission should reopen the proceeding, nullify the exemption authority, and afford interested persons the opportunity to make an offer to purchase the property or to seek a public use condition.

In support of its claim of changed circumstances, NCRR relies on four documents submitted as exhibits to its petition: (1) a letter from City Mayor Sue Myrick to NCRR President E. Stephen Stroud; (2) the executive summary from Charlotte 2005 Transportation Plan: Transit Corridors Study (June 1989) (hereinafter Executive Summary); (3) a Memorandum of Lease between NCRR and SRC dated June 16, 1969; and (4) a lease between NCRR and SRC, dated August 16, 1895, which the Memorandum of Lease amended. Our review of these documents does not support a claim that the City made a commitment or assumed any obligation that can be used as a basis for finding changed circumstances.

Though the City stated that it was "interested in rail corridor preservation for future urban rail service" (letter from Mayor Myrick to NCRR President Stroud) neither that statement nor any other part of the letter commits the City to act to preserve rail corridors. We do not find a "commitment" to preserve rail corridors from a part of one sentence in a cover letter transmitting a copy of an Executive

Summary of a study on public transportation alternatives (including light rail) to relieve the City's overloaded highway system. The Executive Summary also contains no language that could be interpreted as a commitment by the City to preserve rail corridors. Moreover, the City points out that it met with NCRR officials as early as October 1990 and explained that the City proposed to protect the subject rail corridor for possible light rail use — not for heavy or freight rail use. The notice of exemption filed by NS supports the City, stating that the City's plans for the Convention Center also provided for "preservation of a rail corridor over or paralleling the existing right of way for possible light rail or trolley use."

We find also that neither NS nor the City assumed any obligation under the terms of the Memorandum of Lease, to maintain a connection with NCRR over the abandoned line. Our reading of the memorandum shows that it deals only with NCRR property and that NS was only obligated to determine a point of connection for a right-of-way so that NCRR could connect with NS. NS did not obligate itself to connect with NCRR or to maintain a right-of-way. NCRR's misinterpretation of the Memorandum of Lease does not provide a basis for establishing changed circumstances to reopen the proceeding.

Moreover, we find that NCRR has failed to show that revocation of the abandonment exemption here is necessary to carry out the RTP. Relevant RTP factors include: (1) minimizing the need for Federal regulatory control over railroads (49 U.S.C. 10101a(2)); (2) promoting a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues (49 U.S.C. 10101a(3)); (3) fostering sound economic conditions in transportation (49 U.S.C.

10101a(5)); (4) reducing regulatory barriers to exit the industry (49 U.S.C. 10101a(7)); and (5) encouraging honest and efficient management of railroads (49 U.S.C. 10101a(10)). It would be inconsistent with these policies here to revoke the abandonment exemption granted under our out-of-service rules promulgated in full consideration of the RTP. NCRR has stated that it would like to preserve the option of resuming service on the line upon the 1994 expiration of its long-term lease with NS to operate the line, and that it would then be interested in connecting with NS across the Stonewall Street Bridge. However, if NCRR were to resume service, it could still connect with NS north of Charlotte at milepost 375.5 on the Charlotte-Greensboro line where it connect presently with NS. Thus regulation of the abandonment is not needed for the preservation of future rail service by NCRR or another operator. Accordingly, we will deny NCRR's petition.

This action will not significantly affect either the quality of the human environment of the conservation of energy resources.

It is ordered:

1. NCRR's petition is denied.

2. This decision is effective on February 24, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX F

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CvS 17226

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and NORFOLK
SOUTHERN RAILWAY COMPANY,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

. . . .

5. NCRR owns a continuous railroad line and corridor, approximating 316 miles in length, across the State of North Carolina from the City of Charlotte to Morehead City, North Carolina ("NCRR's railroad line" or "NCRR's line").

6. The southern terminus of NCRR's railroad line is located in downtown Charlotte at its railroad line's

intersection with the southern right of way line of Second Street. ("NCRR's southern terminus").

7. NCRR's railroad line connects with a railroad line owned by defendant NS at NCRR's southern terminus. NS' line continues south from that point through the remainder of Charlotte and to points beyond as an interstate railroad line ("NS railroad line" or "NS line").

8. For many years, NS utilized NCRR's line through downtown Charlotte pursuant to leases between NS and NCRR. NS used its own railroad line and NCRR line which connects thereto for all types of traditional railroad uses.

9. Prior to 1969 NCRR and NS jointly owned that certain lot or parcel of land located on the southern side of East Second Street immediately adjoining the NCRR's southern terminus which is identified as Lot A on Exhibit A hereto. The joint railroad line ran through Lot A.

10. On December 31, 1968 NCRR and NS executed a new Lease Agreement covering that portion of NCRR's railroad line and related property located between NCRR's southern terminus at East Second Street and Trade Street in Charlotte. . . . .

11. The 1968 Lease expressly excepted and reserved from its terms a 40 foot wide right of way ("40 foot strip") for two railroad tracks to be located:

> such that the track or tracks to be included therein can be connected with track on land now leased by Lessee [NS] from Lessor [NCRR] under said 1895 Lease at Trade Street

on the northeast and track on land owned by Lessee on the southwest so as to form and maintain a continuous through track connection ..... [emphasis added]

. . . .

14. In 1972 NS filed of record a plat depicting the 40 foot strip as connecting with the railroad line and the then existing railroad right of way over the Subject property ("Right of Way") running from NCRR's southern terminus, over lot A and continuing southerly to and across the remainder of the Subject Property, the Right of Way and East Stonewall Street.

. . . .

17. On or about November 29, 1990, NS entered into a contract ("Contract") to sell to the City a parcel of property located between East Stonewall Street and East Second Street (the "Subject Property") . . . .

. . . .

Count One

. . . .

39. NCRR has an easement implied by reservation based on pre-existing use over, across and through Lot A.

Count Two

. . . .

41. NCRR has an express easement over, across and through the Subject Property.

Count Three

. . . .

43. The Subject Property is encumbered by an equitable servitude in the nature of a railroad right of way so as to provide a continuous through connection between NCRR's line and NS's line.

Count Four

. . . .

45. The Subject Property is encumbered by a restrictive covenant or negative easement prohibiting any use which is inconsistent with a continuous through track connection between NCRR's line and NS' line.

Count Five

. . . .

47. NCRR has an express contractual agreement with NS to keep and maintain a continuous through track connection between NCRR's line and NS' line.

Count Six

. . . .

49. Alternatively, NCRR has an implied contract with NS whereby NS agreed to maintain a continuous through track connection between NCRR's line and NS's line.

Count Seven

. . . .

51. NCRR has an implied contract with the City of Charlotte whereby the City is required to maintain the existing railroad corridor or a like corridor.

Count Eight

. . . .

53. NCRR, as a third party beneficiary of the Contract between the City and NS, has a contractual right to require the Contract to be performed according to its terms based on failure of consideration for the Amendment.

Count Nine

. . . .

55. NCRR has a property interest and right created under federal law to seek to offer to purchase, to finance operations on, to seek public use conditions on, or to otherwise limit or prohibit the attempted abandonment of the NS line.

56. As stated above, there exists among the parties an actual, genuine and existing controversy as to their respective rights concerning the Subject Property. NCRR is entitled to a declaration of its aforesaid right, title or interest and to an order, pursuant to N.C.G.S. § 1-259, protecting the same from any interference with said right, title or interest by defendants.

WHEREFORE plaintiff prays:

(a) That the Court declare plaintiff's right, title and interest in Lot A, the Subject Property, the Right of Way, and the Norfolk Southern railroad line and enter an order protecting the same from any interference by defendants; . . . .

* * * * *

APPENDIX G

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CvS 17226

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and NORFOLK
SOUTHERN RAILWAY COMPANY,
Defendants.

TRANSCRIPT OF MOTIONS
HEARING ON MAY 2 [*sic*], 1992

THIS CAUSE coming on to be heard and being heard before the Hon. Claude S. Sitton, Judge Presiding on the 2nd [*sic*] day of May, 1992 at a regularly scheduled session of Superior Court of Mecklenburg County, for the hearing of Motions, the following proceedings were had, to-wit:

. . . .

MR. McLENDON: . . . In the Summer of 1991 a petition was filed with the I.C.C. to approve the abandonment of that short piece of track on the .55 acres which the I.C.C. approve [*sic*]. Sometime later, specifically I believe the date was December the 10th, as I recall, '91, North Carolina Railroad Company filed a Lawsuit and simultaneously filed a petition with the I.C.C. to re-open the abandonment proceeding before the I.C.C. alleging that North Carolina Railroad had some Right over that .55 acreage [*sic*] and alleging that they had a contractual obligation with this new right-of-way to tie into the old Norfolk & Southern Railway down at Second Street. Now, the I.C.C. considered that petition and in a fairly lengthy denial of that petition specifically said that there was no such agreement at all and that the location of the right-of-way between Trade Street and Second Street established no Right in North Carolina Railroad at all and that the abandonment was conclusive and final.

. . . . There was no obligation on Southern Railway to continue that connection anymore [*sic*] than it is to continue the connection from Salisbury to Atlanta or Danville to Greensboro. That can be withdrawn with I.C.C. approval at any time. . . . .

MR. SAINTSING: . . . I'll just point out that it is clear from Federal Law, there's no shades of gray here, abandonments are issues to be decided exclusively by the Interstate Commerce Commission, that is exclusive full jurisdiction and it pre-empts any declaration of Rights as [*sic*] regard to abandonment by any other Court. That applies even if a Plaintiff is attempting not to re-litigate an abandonment as such but is attempting in some way to re-litigate the issues of a requirement that an interstate carrier provide either service or rails. That's the only reason Norfolk/Southern is

a Defendant in this case. Norfolk/Southern has no property interest in the Lot A or the subject property, that's been conveyed to the City in abandonment and the tracks are gone. The only basis for attempting Norfolk/Southern in here, in this case is these five or six words taken out of context from the memory [*sic*] of the Lease. The Interstate Commerce Commission explicitly ruled that to take those words out of context would be a misinterpretation. Norfolk/Southern was entitled to abandon the track. That's the final word on the issue. Norfolk/Southern is out of the property and, Judge, should be out of this Lawsuit. Thank you.

* * * * *

APPENDIX H

49 U.S.C. § 10501

Section 10501 of Title 49, United States Code, provides, in part:

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

> (1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—
>
> > (A) only by railroad;
> >
> > . . . and
>
> (2) to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in—
>
> > (A) a State and a place in another State;
> >
> > . . . .

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

> (1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not

> transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle . . . .

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with the respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

* * * * *

49 U.S.C. § 10901(a)

Section 10901(a) of Title 49 of the United States Codes provides, in part:

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

* * * * *

49 U.S.C. § 10903

Section 10903 of Title 49 of the United States Code provides, in part:

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

* * * * *

Supreme Court, U.S.
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No. 94-464

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THE NORTH CAROLINA RAILROAD COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The Court of Appeals Of North Carolina

BRIEF IN OPPOSITION

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33pp

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE. 1

SUMMARY OF ARGUMENT. 7

REASONS FOR DENYING THE WRIT. 8

APPENDIX A. 1a

APPENDIX B. 3a

APPENDIX C. 5a

APPENDIX D. 7a

APPENDIX E. 10a

TABLE OF AUTHORITIES

CASES

Central New England Railway Co. v. Boston & Albany Railroad Co., 279 U.S. 415 (1929). 14

Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). 16

Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., 467 U.S. 622 (1984). 14

Knotville Volunteer Fire Department, Inc. v. Wilkes County, 94 N.C. App. 377, 380 S.E.2d 422, cert. denied, 325 N.C. 432, 384 S.E.2d 538 (1989). . . 10

Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1915). 16

STATUTES

28 U.S.C. § 1257. 12

49 U.S.C. § 10103. 16

49 U.S.C. § 10501. 12

49 U.S.C. § 10903. 13

N.C. Gen. Stat. § 1-253. 8

N.C. Gen. Stat. § 1-259. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-464

NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER

v.

THE NORTH CAROLINA RAILROAD COMPANY,
RESPONDENT

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF NORTH CAROLINA**

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, The North Carolina Railroad Company, owns a railroad line and corridor across North Carolina, originating at Morehead City and terminating in

downtown Charlotte at Second Street (the "NCRR Right of Way"). Since the mid-1800's, the NCRR Right of Way has connected to the railroad line and corridor owned by Petitioner, Norfolk Southern Railway Company, to form a continuous railroad line continuing south from Second Street. This connection to the Petitioner's line occurs on a small parcel of land, owned jointly by Petitioner and Respondent, located on the south side of Second Street ("Lot A"). Lot A is contiguous to a larger tract of land, owned at all relevant times by Petitioner, encompassing most of the city block bounded by Second Street on the north and East Stonewall Street on the south ("the Subject Property"). Petitioner's railroad line extends south from its connection with Respondent's railroad line at Lot A, through the subject property, and then to points south. Petr.App. 4a.

Pursuant to a 99-year lease executed in 1895 ("the 1895 Lease"), Respondent leased the NCRR Right of Way to the Southern Railway, the predecessor of Petitioner. By virtue of this arrangement, a continuous railroad line has run across North Carolina on the Respondent's right of way to Charlotte, where it connected with the Petitioner's right of way on Lot A, and then continued through the subject property and the rest of downtown Charlotte, on to points south. Since the execution of the 1895 Lease, which expires by its terms on January 1, 1995, Petitioner has conducted all rail operations on

Respondent's line, and Respondent has conducted no rail operations. Petr.App. 4a-5a; 26a-27a.

In 1968 Petitioner and Respondent executed a new lease ("the 1968 Lease") for certain parcels of land located immediately north of the Subject Property and Lot A. Resp.App. 7a-9a. The NCRR Right of Way runs through these parcels. The 1968 Lease extended the 1895 Lease term for these parcels, but expressly excepted and reserved from its terms, and thereby left subject to the 1895 Lease, a forty foot wide right of way ("40 foot strip") for two railroad tracks to be located,

> such that the track or tracks to be included therein can be connected with track on land now leased by Lessee [Petitioner] from Lessor [Respondent] under said 1895 Lease at Trade Street on the northeast and track on land owned by Lessee on the southwest so as to form and maintain a continuous through track connection. . . .

Resp.App. 8a.

Simultaneously with the execution of the 1968 Lease, Respondent executed a deed ("the 1968 Deed") conveying its interest in Lot A to Petitioner. Petr.App. 5a; 27a-28a.

After executing the 1968 Lease and 1968 Deed, Petitioner continued to run trains over the NCRR Right of Way, through the parcels subject to the 1968 Lease over the 40 foot strip, over Lot A and the Subject Property, and over Petitioner's right of way to the south. In 1971 Petitioner recorded a plat depicting the 40 foot strip connecting Respondent's right of way to Lot A, the Subject Property, and Petitioner's right of way to the south. Petr.App. 5a.

In 1990 the City of Charlotte (the "City") developed plans to construct a new convention center on the Subject Property. On November 29, 1990, the City entered into a contract ("the 1990 Contract"), without the knowledge of Respondent, to purchase the Subject Property from Petitioner. Resp.App. 5a-6a. The 1990 Contract specifically reserved a railroad corridor 50 feet wide over the Subject Property along the then existing route of the railroad. On June 12, 1991, Petitioner and the City executed an amendment to the 1990 Contract ("the 1991 Amendment") providing that if Petitioner could obtain Interstate Commerce Commission ("ICC") approval for abandonment of its railroad line over the Subject Property, Petitioner would release the reserved 50 foot railroad easement to the City. Petr.App. 5a; Resp.App. 3a-4a.

In 1991 Petitioner filed with the ICC a Notice of Exemption for Abandonment of a 0.13 mile section of

track passing over the Subject Property. Petr.App. 16a. Respondent did not oppose Petitioner's request because of the Petitioner and City's representations and promises to preserve the railroad corridor through the Subject Property. On June 25, 1991, before the ICC reached a decision, Petitioner executed a deed ("the 1991 Deed") conveying the Subject Property to the City. Resp.App. 1a-2a. Consistent with the 1990 Contract, the 1991 Deed expressly reserved the existing railroad easement, corridor, and through track connection over the Subject Property. On July 16, 1991, the ICC ordered that the abandonment would become effective August 30, 1991. Petr.App. 16a. Respondent subsequently learned that Petitioner not only intended to abandon the railroad line over the Subject Property but that it intended to extinguish the railroad easement, and that the City intended to construct a new convention center on the Subject Property in a manner that prohibited railroad use of the corridor over the Subject Property.

On December 10, 1991, Respondent commenced this action by filing a complaint in Superior Court of Mecklenburg County, North Carolina, seeking a declaration of the Respondent's "right, title and interest in Lot A, the Subject Property, the Right of Way, and the Norfolk Southern railroad line. . . ." Respondent based its complaint on various express and implied agreements made by Petitioner and the City to maintain the railroad

corridor over Lot A and the Subject Property. Petr.App. 26a-31a.

Contemporaneously with the filing of its complaint, Respondent filed a petition before the ICC to reopen and reconsider the Petitioner's abandonment exemption. On February 18, 1992, the ICC denied Respondent's petition without a hearing and without taking any evidence. Petr.App. 20a. Respondent then voluntarily dismissed Count 9 of the complaint which requested the court to limit or prohibit the attempted abandonment.

In an order dated May 19, 1992, the Mecklenburg County Superior Court granted Petitioner's motion for summary judgment on Respondent's claims based on express contract and express easement,[1] but denied summary judgment with respect to claims of an "easement implied by reservation," an "equitable servitude in the nature of a railroad right of way," and implied contracts

---

[1] Respondent cross-appealed the trial court's granting of summary judgment on Respondent's express contract and easement theories. The North Carolina Court of Appeals found that this appeal was interlocutory. Therefore, the trial court's dismissal of the express contract and easement claims has yet to be considered by the North Carolina Court of Appeals.

to maintain a railroad connection or corridor.[2] The court also denied Petitioner's motion to dismiss for lack of subject matter jurisdiction and motions to dismiss the action for failure to state a claim on which relief could be granted. Petr.App. 12a-15a.

The trial court's denial of Petitioner's motion for dismissal for lack of subject matter jurisdiction was upheld by the North Carolina Court of Appeals in an opinion dated December 7, 1993. Petr.App. 3a-11a. The North Carolina Supreme Court dismissed Petitioner's appeal and denied its petition for discretionary review by an order entered on June 16, 1994. Petr.App. 1a-2a.

The section of railroad line extending over the Subject Property, which was abandoned subject to the abandonment proceeding and subsequently sold to the City by Petitioner, has been torn out and the City has substantially completed construction of the new convention center on the Subject Property.

SUMMARY OF ARGUMENT

This case simply involves application of the well-settled caselaw that abandonment of a rail line does not extinguish a railroad's prior contractual and property

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[2] In addition, there is an inverse condemnation claim for damages against the City that is still pending.

obligations, nor does abandonment prohibit those rights from being determined by state courts. This precedent is acknowledged by Petitioner in its petition for a writ of certiorari. Respondent initiated this proceeding to determine its contractual and property rights concerning Petitioner's railroad rail line and corridor in light of promises made to preserve the rail line and corridor. Respondent does not seek a reversal of the Interstate Commerce Commission's decision to allow abandonment of the track in question.

REASONS FOR DENYING THE WRIT

Petitioner has mischaracterized the nature of this litigation at all levels and continues to do so in its petition for writ of certiorari to this Court. Despite Petitioner's assertions to the contrary, Respondent has never demanded reconstruction or reconnection of the rail line abandoned by Petitioner. Petr.App. 28a-31a. Thus, the jurisdiction of the ICC has not been infringed upon, and there is no claim that implicates constitutional issues.

In its complaint, Respondent sought a declaratory judgment, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, of its state law rights that derive from written instruments and agreements between Respondent and Petitioner and from common law property rights. Specifically, Respondent sought a declaration of rights on eight separate and distinct claims: express rights to an easement

and express rights to a through track connection; Respondent's implied rights to the same; a negative easement over property in which Respondent has rights; and Respondent's express, implied, and third-party beneficiary contract rights in several written agreements. The trial court dismissed the claims based on express contract and easement but left standing the claims based on the implied theories. If Respondent is successful in the trial on the merits on those theories, Respondent will seek whatever remedies are available to it pursuant to N.C. Gen. Stat. § 1-259, which provides:

> Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

This statute authorizes a party to seek relief after a declaratory judgment action because "[n]one of the declaratory judgment statutes. . . require one seeking adjudication of contract rights to go further and seek an

enforcement of those rights. . . ." *Knotville Volunteer Fire Dept. v. Wilkes County*, 94 N.C. App. 377, 379, 380 S.E. 2d 422, *cert. denied*, 325 NC 432, 384 S.E. 2d 538 (1989). Among the remedies available to Respondent are damages for the diminished economic value of its line. Reconstruction of Petitioner's lines in such a way as to allow full rail operations is improbable, if not impossible, because of the ICC abandonment order, and because the new convention center sits atop the Subject Property and the railroad corridor.

Despite the availability of several damage remedies under state law, Petitioner continues to assert that Respondent's only request is for an order requiring reconstruction of the track abandoned by Petitioner, relief that Respondent has never requested. In its petition for writ of certiorari, Petitioner states:

> Under this decision, an interstate rail carrier could pursue and receive authorization from the Interstate Commerce Commission to abandon a line of railroad, yet still be subject to a putative duty under state law to maintain a track connection for the benefit of a state court claimant. Petr.Pet. 6.
>
> In the present case, respondent's complaint demands that North Carolina's state courts

declare that petitioner has a contractual obligation to maintain a "continuous through track connection between NCRR's line and NS' line." Petr.Pet. 8.

In fact, respondent's demand that an interstate rail carrier provide "a continuous through track connection" with petitioner necessarily implicates the duty to provide a track connection between the two railroads at some point. Petr.Pet. 9.

Respondent's demand for a connection between lines means a court must order that (1) the parties lines must connect somewhere, and (2) such a connection must be located so as to provide respondent with a rail corridor proceeding south from the southern terminus of respondent's line. Petr.Pet. 12.

Now respondent seeks a state-court declaration that petitioner must provide a connection at the very place where the Commission has authorized abandonment. . . . Petr.Pet. 15.

None of these statements has merit because Respondent has never asked the court to mandate a railroad service connection between Respondent's southern terminus and Petitioner's interstate line; never asked the court to reverse the ICC's approval of track abandonment; and, in fact, never asked the court to do anything that would invade the ICC's exclusive jurisdiction in matters of interstate commerce.

Respondent has mischaracterized the nature of this litigation in order to create a federal question arising under 28 U.S.C. § 1257(a), which provides that this Court may grant certiorari in cases involving a "title, right, privilege, or immunity . . . specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." The North Carolina Court of Appeals' decision in no way involves a question arising under the United States Constitution or any statute of the United States. The North Carolina Court of Appeals' (and the trial court's) decision merely dealt with reviewing the real property and contract claims asserted by Respondent and statutory construction of the grants of jurisdiction to the ICC.[3] This distinction was succinctly captured by the

---

[3] The ICC's general grant of jurisdiction is set forth in 49 U.S.C. § 10501. Its specific jurisdiction over abandonment and discontinuance of railroad lines and rail

(continued...)

North Carolina Court of Appeals in its statement that "[t]he instant case turns on state law construction of written instruments, specifically the language of the 1968 lease, the 1968 deed and the 1990 contract herein, while the I.C.C. ruling applies to the abandonment of the railroad." 112 N.C. App. 762, 768, 437 S.E.2d 393, 396 (1993). While Petitioner successfully petitioned the ICC to abandon rail lines, it did not and could not, by virtue of its ICC abandonment petition, relieve itself of liability from the claims asserted in Respondent's declaratory judgment action.

There are no novel or unique questions involved in this case. This case can be decided under the well-established precedent of this Court that abandonment of a rail line does not extinguish a railroad's prior contractual obligations and property rights, nor does abandonment prohibit those rights from being determined by state courts. This precedent is cited by Petitioner in its petition for writ of certiorari where it states, "[a]s this Court has recognized, Commission authority over a carrier's right of way diminishes or ceases after

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[3] (...continued)
transportation is set forth in 49 U.S.C. § 10903. Neither section 10501 nor section 10903 grant any jurisdiction to the ICC over state law claims that do not involve interstate commerce.

abandonment, and carriers might have post-abandonment contractual obligations and property rights that are justiciable as a matter of ordinary contract and property law." Petr.Pet. 11, emphasis added. Petitioner cites *Central New England Railway Co. v. Boston & Albany Railroad Co.*, 279 U.S. 415 (1929), for the proposition that the ICC's abandonment order for a section of track did not purport to relieve a railroad of the contractual obligations it made relating to the abandoned track. This is the identical position taken by Respondent in this matter. Respondent initiated this proceeding to determine its contractual and property rights concerning the railroad right of way over the Subject Property in light of promises made to preserve the rail line and corridor. Respondent does not seek a reversal of the ICC decision to allow abandonment of the track.

Petitioner then goes on to state that "[i]n a more recent opinion, the Court held that the Interstate Commerce Act does not preempt state jurisdiction over rail property after the commission has authorized abandonment." Petr.Pet. 11. In support of this statement, Petitioner discusses *Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co.*, 467 U.S. 622 (1984). In that case, the Supreme Court held that a post-abandonment state court lawsuit for condemnation was not preempted by the Interstate Commerce Act. In *Hayfield Northern*, Chicago and North Western ("Chicago") successfully petitioned for abandonment of a portion of a

rail line over the objections of a group of shippers. The shippers then formed Hayfield Northern Railroad Co. and filed suit to condemn the rail property. Chicago sought dismissal based on preemption. On appeal, the Supreme Court rejected the preemption argument, noting that nowhere in the Act had the ICC been granted exclusive and plenary jurisdiction over railroad property after abandonment. To the contrary, "unless the Commission attaches postabandonment conditions to a certificate of abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end." As summarized by Petitioner, "[t]he Court held that the abandoned line did not remain under the Commission's jurisdiction after abandonment; therefore, the railroad's abandoned right of way and track could properly be subject to taking under a state condemnation proceeding." Petr.Pet. 12.

After citing these cases and explicitly acknowledging that carriers might have post-abandonment contractual obligations and property rights that are justiciable as matters of ordinary contract and property law, Petitioner states that "[in] the present case, petitioner has no alleged contractual obligation to respondent that could be imposed independent of the duty respondent alleges to provide a connection between petitioner's line and respondent's line." Petr.Pet. 12. This statement is in error and once again demonstrates Petitioner's mischaracterization of Respondent's claim. Respondent's

claim concerns state law contractual obligations and property rights based on promises and statements made to Respondent to the effect that the rail line and corridor would be maintained. The fact that the line has been abandoned is irrelevant to Respondent's pursuit of those claims.

The primary case relied upon by Petitioner in support of its writ for certiorari, *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), does not alter the conclusion that Respondent can pursue its contract and property claims in state court. *Kalo* properly held that state law claims based on the failure to maintain track and right of way on a line abandoned with ICC approval are preempted. However, the *Kalo* Court explicitly pointed out that, pursuant to 49 U.S.C. § 10103, state law claims may survive enactment of the Interstate Commerce Act so long as "'there is no administrative question involved.'" 450 U.S. at 328. (quoting *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915)). In *Puritan Coal*, the Supreme Court determined that the plaintiff could litigate the question of "whether the railroad had carried out the duties it had agreed to undertake," despite the Commission's rulings on administrative matters (emphasis added). Under *Puritan Coal*, Kalo Brick could have litigated state law claims against the rail carrier if the carrier had previously entered into an agreement with Kalo, as long as the remedies sought were not inconsistent

with an ICC ruling or prohibited under the Act. Additionally, the state statute addressed in *Kalo* concerned a rail carrier's obligation to provide service to a shipper, a matter squarely within the ICC's exclusive jurisdiction. By contrast, Respondent's claims in this case do not concern provision of railroad service, nor do they contest the ICC jurisdiction over abandonment of railroad lines, which ultimately concerns service. The ICC alone has jurisdiction over abandonment of interstate rail lines, while Respondent's state law claims simply concern a declaration of rights pursuant to contract and property principles. The jurisdiction of the ICC does not preempt Respondent's right to seek redress of its state law claims in state court. Since the Act and the state law claims exist for clearly different purposes and address different conduct, there can be no question as to the lack of preemption. Because Respondent does not seek any remedy inconsistent with the ICC's order allowing abandonment, and Petitioner explicitly agreed to provide certain rights to Respondent under written agreements and instruments, there can be no preemption.

CONCLUSION

All Respondent seeks to adjudicate are its rights pursuant to the contracts and agreements, express and implied, entered into between Respondent and Petitioner and the City. Respondent has never sought to have the court mandate the rail connection with Petitioner and has

not asked the state court to reverse the ICC's ruling on abandonment of the track in question. This case involves nothing more than the application of well-settled law to the facts of this case. Applying the well settled law in this case, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent
**Counsel of Record*

October 17, 1994

APPENDIX

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APPENDIX A

1991 DEED

THIS INDENTURE made this 25th day of June, 1991, between

CHARLOTTE-SOUTHERN CORPORATION, a North Carolina corporation, and NORFOLK SOUTHERN RAILWAY COMPANY (formerly named Southern Railway Company), a Virginia corporation, together Grantors, parties of the first part; and

CITY OF CHARLOTTE, a North Carolina municipal corporation, Grantee, party of the second part:

WITNESSETH:

THAT the said Grantors, for and in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) and other good and valuable consideration in hand paid at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said Grantee, its successors and assigns, subject to the matters hereinafter provided the following described property, to wit, ...

Parcel 1

. . . .

Parcel 2

. . . .

Parcel 3

. . . .

LESS AND ACCEPT any railroad trackage located on the premises.

RESERVING unto Grantors, their successors and assigns, an easement or right of way for railroad purposes over and upon the premises; said easement being the same easement reserved by Southern Railway Company in that certain Indenture between Southern Railway Company and Charlotte-Southern Corporation, dated December 31, 1968, a memorandum of which is recorded with the Register of Deeds of Mecklenburg County in Book 3096, Page 280, and that certain Amendment to Indenture between Southern Railway Company and Charlotte-Southern Corporation, dated July 31, 1971, recorded with the Register of Deeds of Mecklenburg County in Book 3365, Page 21; said railroad easement area being called on such instruments the "Reserved 50-Foot Strip", reference to said instruments being hereby made in order to precisely determine the location and conditions pertaining to such railroad easements or right of way. . . . .

APPENDIX B

AMENDMENT TO CONTRACT OF PURCHASE AND SALE

This Amendment to Contract of Purchase and Sale is entered into effective the 12th day of June, 1991 between Norfolk Southern Railway Company (formerly named Southern Railway Company), a Virginia corporation, and Charlotte-Southern Corporation, a North Carolina Corporation, hereinafter together called "Seller"; and

The City of Charlotte, an instrumentality of government created pursuant to the laws of the State of North Carolina, hereinafter called "Purchaser",

. . . .

For good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties hereby amend the Contract as follows:

1. Seller agrees to make all good faith, reasonable efforts to obtain permission to abandon the section of railway track lying between the easterly boundary of E. 2nd Street and the westerly boundary of the bridge/underpass structure crossing E. Stonewall

Street (the "Red Track"). Seller will make appropriate filings for permission to abandon with the Interstate Commerce Commission and applicable government agencies on or before July 31, 1991. Purchaser shall make all good faith reasonable efforts to assist Seller in this regard if so requested by Seller.

2. The following is added as an additional sentence at the end of Paragraph 5(a) of the Contract:

Upon the latter of (a) the effective date of final authorization by the Interstate Commerce Commission for abandonment of the railway track within the reserved right of way; and (b) Seller's delivery to Purchaser or to Chicago Title Insurance Company ("Chicago Title") of the "Releases" (as defined in Paragraph 3 of this Amendment), Purchaser shall have the right to remove and retain the railroad trackage located within the reserved right-of-way, and Seller shall deliver a fully executed quitclaim deed or other similar instrument appropriate to reflect the extinguishment of the reserved easement interest and the conveyance of the subsequent reversionary interest to Purchaser.

. . . .

APPENDIX C

CONTRACT OF PURCHASE AND SALE

This Agreement, made and entered into this 29th day of November, 1990, between SOUTHERN RAILWAY COMPANY, a Virginia corporation, and CHARLOTTE-SOUTHERN CORPORATION, a North Carolina corporation, hereinafter together called "Seller", parties of the first part; and

The CITY OF CHARLOTTE, an instrumentality of government created pursuant to the laws of the State of North Carolina, hereinafter called "Purchaser", party of the second part;

WITNESSETH:

1. Seller agrees to sell and convey to Purchaser and Purchaser agrees to purchase from Seller, upon and subject to the terms and conditions hereinafter set forth, the land or property of Seller located in Charlotte, Mecklenburg County, North Carolina, containing in the aggregate 3.369 acres, more or less, together with the existing underpass structure crossing Stonewall Street,

. . . .

5. At settlement, the Seller shall convey to Purchaser by Special Warranty Deed, good and marketable title in fee simple to the Property, free and clear of any and all liens and encumbrances, except the following:

. . . .

e. A reservation by Seller unto itself, successors and assigns, of a perpetual easement or right of way for railroad purposes over and upon the Property; said easement being the same easement reserved by Southern Railway Company in that certain Indenture between Southern Railway Company and Charlotte-Southern Corporation dated December 31, 1968, a memorandum of which is recorded with the Register of Deeds of Mecklenburg County in Book 3096, Page 283, and that certain Amendment to Indenture between Southern Railway Company and Charlotte-Southern Corporation dated July 31, 1971, recorded with the Register of Deeds of Mecklenburg County in Book 3365, Page 21; said railroad easement area being called in such instruments the "Reserved 50-Foot Strip", reference to said instruments being hereby made in order to precisely determine the location and conditions pertaining to such railroad easement or right of way.

. . . .

APPENDIX D

1968 LEASE AGREEMENT

THIS LEASE AGREEMENT, made and entered into this 31st day of December, 1968, by and between the NORTH CAROLINA RAILROAD COMPANY, a North Carolina corporation, with its principal office and place of business in Raleigh, North Carolina, hereinafter called "Lessor", and the SOUTHERN RAILWAY COMPANY, a Virginia corporation, with its registered North Carolina office in Raleigh, North Carolina, hereinafter called "Lessee".

. . . .

In further consideration of the premises and the mutual promises and obligations herein contained, Lessor does hereby demise and lease to Lessee and Lessee does hereby take and hire from Lessor the following described real property (including the air rights), and other property rights located in the City of Charlotte, Mecklenburg County, North Carolina (hereinafter sometimes referred to as "Demised Premises"):

. . . .

Parcel No. 4

. . . .

RESERVING and ACCEPTING, however, from the foregoing demise and lease a surface area forty (40) feet in width and the air space over and above said surface area up to a height of twenty-three (23) feet above the top of any rail (except the portion thereof necessary, for supporting columns) as a right of way for two railroad tracks (hereinafter called "40-Foot Strip"), the exact location of such 40-Foot Strip to be determined by Lessee not later than January 1, 1972, provided that such exact location of the 40-Foot Strip by Lessee shall be such that the track or tracks to be included therein can be connected with track on land now leased by Lessee from Lessor under said 1895 Lease at Trade Street on the northeast and track on land owned by Lessee on the southwest so as to form and maintain a continuous through track connection, it being understood that all air space, other than that referred to in this Reserving and Excepting Clause, is, by this lease, leased and demised to Lessee. The parties hereto agree that Lessee will cause to be prepared an accurate survey of said 40-Foot Strip and will duly execute the same and cause the same to be recorded in the Office of the Register of Deeds for Mecklenburg County on or before January 1, 1972. The 40-Foot Strip reserved and excepted herein shall be and

continue subject to the rights of Lessee under the said 1895 Lease between Lessee and Lessor.

. . . .

APPENDIX E

49 U.S.C. § 10103

Section 10103 of Title 49, United States Code, provides:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

F E D
OCT 14 1994
OFFICE OF THE CLERK

No. 94-464

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
THE NORTH CAROLINA RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

---

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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October 14, 1994

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10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
THE JURISDICTIONAL FINDING OF THE COURT OF APPEALS OF NORTH CAROLINA CONFLICTS WITH THE EXCLUSIVE AND PLENARY AUTHORITY OF THE INTERSTATE COMMERCE COMMISSION TO REGULATE INTERSTATE RAIL TRANSPORTATION AND WILL CAUSE SERIOUS UNCERTAINTY UNLESS REVERSED	4
CONCLUSION	7

TABLE OF AUTHORITIES

CASES	Page
Alabama & Vicksburg Railway Co. v. Jackson & Eastern Railway Co., 271 U.S. 244 (1926)	6
Chicago and N.W. Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	4, 5, 6, 7
Colorado v. United States, 271 U.S. 153 (1926)	4, 5
Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co., 467 U.S. 622 (1984)	4, 5, 6
Transit Comm'n v. United States, 289 U.S. 121 (1933)	6
STATUTES AND REGULATIONS	
28 U.S.C. § 2344	3
49 U.S.C. § 10101a	2
49 U.S.C. § 10901(a)	5
49 C.F.R. § 1152.50(b)	2
ACTS	
Railroad Revitalization and Regulatory Reform Act of 1976, (4-R Act), Pub. L. No. 94-210, 90 Stat. 31	6
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-464

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THE NORTH CAROLINA RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER [1]

INTEREST OF *AMICUS CURIAE*

The Association of American Railroads (AAR) is a voluntary, non-profit incorporated trade association of the Nation's major railroads. Each of AAR's members is an interstate carrier by rail subject to the jurisdiction of the Interstate Commerce Commission. AAR's members operate approximately 75 percent of the line haul mileage, employ approximately 89 percent of the workers, and produce approximately 91 percent of the freight revenues of all railroads in the United States. AAR represents its members before courts, agencies and the Congress in matters of common concern.

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[1] Petitioner and Respondent have consented to the filing of the brief. The letters signifying consent have been filed with the Clerk.

As the trade association for the Nation's railroads, AAR has a vital interest in ensuring that the federal rail regulatory scheme administered by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101a *et seq.*, remains, as Congress intended, the *exclusive* means through which interstate rail commerce is regulated. AAR accordingly has a vital interest in ensuring that federal preemption principles are properly applied to protect against efforts of state and local authorities to interfere with interstate rail carrier operations subject to exclusive Commission jurisdiction. Because the decision of the North Carolina Court of Appeals effectively asserts state court jurisdiction to determine interstate rail transportation matters subject to exclusive Commission jurisdiction with respect to abandonment and inter-carrier track connections and service requirements, AAR has an important stake in urging that federal preemption principles be properly applied and that the decision below be reversed.

STATEMENT OF THE CASE

The state court action for which review is sought in this case involves an effort by respondent, The North Carolina Railroad Company (NCRR), to relitigate in state court a decision of the Commission approving the abandonment of a small segment of track in Charlotte, North Carolina formerly operated in interstate commerce by Petitioner Norfolk Southern Railway Company (NS). NS was initially granted the right to abandon the track pursuant to an exemption application approved by the Commission under regulations applicable to lines that have been "out-of-service" for at least two years. 49 C.F.R. 1152.50(b). The Commission's exemption decision became effective August 30, 1991. Pursuant to the abandonment approval, NS sold the abandoned property to the City of Charlotte for use as a convention center site.

In challenges filed December 10, 1991 before both the Interstate Commerce Commission and the North Carolina

state courts, NCRR sought to reopen the Commission's abandonment decision. NCRR claimed that the abandonment authorization should be revoked because NCRR, pursuant to a lease agreement with NS, allegedly had an express or implied agreement with NS "to keep and maintain a continuous through track connection between NCRR's line and NS' line [over the abandoned property]." Pet. App. 23a-24a, 26a-29a.

The Commission considered and rejected NCRR's claim that NS was required under the terms of the lease agreement to maintain a connection with NCRR over the abandoned line. Pet. App. 24a. The Commission also noted that NS' and NCRR's lines connect north of Charlotte and that regulation of the abandonment was not "needed for the preservation of future rail service by NCRR or another operator." Pet. App. 25a.

NCRR did not appeal from the Commission's decision denying its petition to reopen the abandonment under the applicable federal review statute. 28 U.S.C. § 2344. NCRR instead pursued its claim to a right of "continuous through track connection" with NS before the North Carolina state courts (to which action the City of Charlotte was also made a defendant).

In the decision for which review is sought, the North Carolina Court of Appeals affirmed the lower court's determination that it had subject matter jurisdiction over NCRR's claim against NS. In so doing, the court rejected NS' contention that the issue of NCRR's right to connect with NS over the abandoned property was subject to the exclusive jurisdiction of the Commission. The North Carolina Court of Appeals reasoned that the state courts were not preempted because "the instant case turns on state law construction of written instruments . . . while the I.C.C. ruling applies to the abandonment of the railroad." Pet. App. 8a-9a.

NS' petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

THE JURISDICTIONAL FINDING OF THE COURT OF APPEALS OF NORTH CAROLINA CONFLICTS WITH THE EXCLUSIVE AND PLENARY AUTHORITY OF THE INTERSTATE COMMERCE COMMISSION TO REGULATE INTERSTATE RAIL TRANSPORTATION AND WILL CAUSE SERIOUS UNCERTAINTY UNLESS REVERSED

1. As this Court has repeatedly found, the jurisdiction of the Interstate Commerce Commission to authorize rail abandonment is exclusive and plenary. *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981); *Colorado v. United States*, 271 U.S. 153, 164 (1926). The decision whether to permit an abandonment is within the sole discretion of the Commission, charged under the Interstate Commerce Act with balancing the competing local and interstate commerce interests at stake. *Kalo* at 320-21; *Colorado* at 168-69. Once approved by the Commission, an authorized abandonment may be effected regardless of any conflicting claims predicated on state law. *Kalo* at 324-26; *Colorado* at 165 ("even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce").

The preemption principles invoked by this Court in *Kalo* and *Colorado* emphatically apply to the abandonment authorized by the Commission in this case. Pursuant to the Commission's abandonment authorization, an abandoning carrier (such as NS in the instant case) has no obligation to provide transportation services of any kind over the abandoned property, including "a continuous through track connection" with another carrier as urged by respondent NCRR. *Kalo* at 323; *Colorado* at 161; *Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co.*, 467 U.S. 622, 635 (1984). Indeed, by authorizing the abandonment at issue, the Commission has specifically excused NS from providing any transportation services

over the abandoned line. Regardless of any claim of right arising under "written instruments" or other state common law obligations, a state court is wholly without authority to compel a carrier to provide transportation services that the Commission has excused it from providing pursuant to the agency's exclusive and plenary jurisdiction over abandonments. *Kalo* at 325-26; *Colorado* at 165; *Hayfield* at 635.

Indeed, the application of federal preemption principles in this case is especially compelling. In authorizing the abandonment at issue, the Commission specifically addressed and rejected the claim raised by NCRR that NS had a contractual obligation to provide a through track connection over the abandoned line. The Commission found that no such obligation existed, and that its imposition as a condition of the abandonment was unnecessary in the interests of interstate commerce. Pet. App. 24a-25a. This express finding by the Commission in exercise of its abandonment approval authority "simply leave[s] no room for further litigation over the matter[] . . . in state court." *Kalo* at 327. In this context, the state court action was an improper collateral attack on the Commission decision, from which NCRR sought no direct appeal.

Moreover, not only is the relief sought by NCRR against NS in the North Carolina state court unavailable to it as a matter of federal preemption in the context of Commission-approved abandonments, it is also unavailable on general preemption grounds related to the Commission's exclusive jurisdiction over interstate rail transportation matters. For the reasons set forth in Petitioner's brief (at 9-17), it is only the Commission, and not state courts, that has the authority to authorize the establishment of track connections between interstate carriers and that can require carriers to enter into interline service arrangements for the conduct of interstate rail operations. *See* 49 U.S.C. § 10901(a) (Commission has exclusive authority to approve a carrier's acquisition, construction

or operation of an additional or extended rail line); *Alabama & Vicksburg Railway Co. v. Jackson & Eastern Railway Co.*, 271 U.S. 244 (1926) (Commission has exclusive jurisdiction over the establishment of track junctions between interstate carriers); *Transit Comm'n v. United States*, 289 U.S. 121, 129 (1933) (Commission has exclusive jurisdiction to regulate extensions of service by interstate carriers). The North Carolina state courts are simply without jurisdiction to order the inter-carrier arrangements for interstate rail transportation sought by NCRR against NS in this case, and the state court decision finding such jurisdiction must be reversed.

2. The decision has the potental to seriously disrupt the federal statutory scheme for the regulation of interstate carriers, particularly in the area of abandonments. Unless reversed, the decision below will encourage opponents of Commission-approved abandonments to seek to create state law claims predicated upon express or implied contracts (or other "equitable" rights) upon which to mount direct or collateral attacks on Commission abandonment decisions in state court. Should such litigation tactics become widespread, the abandonment reforms effected by Congress in the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)[2] and the Staggers Rail Act of 1980,[3] would be jeopardized or rendered nugatory, and the abandonment process would no longer be the uniform federal one mandated by Congress under the provisions of the Interstate Commerce Act. *See Kalo* at 320-21; *Hayfield* at 628-31. Such potential consequences of the decision below should not be countenanced by this Court.

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[2] Pub. L. 94-210, 90 Stat. 31.

[3] Pub. L. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. §§ 10903-10906).

CONCLUSION

For the reasons stated above and for the reasons set forth in the Petition, this Court should grant the petition for certiorari and reverse the decision below. If the Court concludes that plenary consideration is not warranted, the judgment of the North Carolina Court of Appeals should be summarily reversed on the authority of *Chicago and N.W. Transportation Co. v. Kalo Brick & Tile Co., supra.*

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

THE NORTH CAROLINA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondent's claims based on state contract and property law are preempted by the Interstate Commerce Commission's authorization of the abandonment of petitioner's rail line in accordance with the Interstate Commerce Act.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995)	10
Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983)	9
Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*:	
450 U.S. 311 (1981)	7, 8, 9, 10
295 N.W.2d 467 (Iowa 1979)	8, 9
Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146 (1986), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989)	3
Hayfield Northern R. R. v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984)	4, 12
Pennsylvania R. R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915)	10

Statutes and regulation:

Hobbs Act, 28 U.S.C. 2344	5
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:	
49 U.S.C. 10101a	5
49 U.S.C. 10501(d)	1
49 U.S.C. 10505	2, 3
49 U.S.C. 10742	2
49 U.S.C. 10901(a)	2
49 U.S.C. 10903(a)	2
49 U.S.C. 10905(c)	4
49 U.S.C. 10906	4
49 U.S.C. 11101(a)	2

Statutes and regulation—Continued: Page

49 U.S.C. 11121(a) 2
49 U.S.C. 11705(b) 2
49 U.S.C. 11705(c) 2
49 C.F.R. 1152.50(b) 3

In the Supreme Court of the United States

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v.

THE NORTH CAROLINA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is a common carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission (ICC) under the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.* The Commission's jurisdiction over interstate transportation by rail carriers is exclusive. 49 U.S.C. 10501(d). The Act sets forth the obligations of rail carriers, and it establishes a comprehensive mechanism for the enforcement of those obligations by the Commission. Specifically, the Act requires carriers to provide transportation upon

reasonable request, 49 U.S.C. 11101(a), as well as to furnish safe and adequate car service. 49 U.S.C. 11121(a). The Act also requires a rail carrier to provide reasonable, proper, and equal facilities for the interchange of traffic between its line and a connecting line. 49 U.S.C. 10742. Either the Commission or a federal district court may hold a railroad liable for damages sustained as a result of a carrier's breach of its common carrier obligations. 49 U.S.C. 11705(b) and (c).

The Act tempers those stringent obligations by allowing the Commission to relieve a railroad from all or part of its common carrier obligation to provide transportation. It also prevents state and local authorities from requiring railroads to institute service over interstate lines without ICC approval. Specifically, a railroad may abandon or discontinue the operation of an interstate line upon receiving a certificate from the Commission based on a finding that the public convenience and necessity require or permit such abandonment, 49 U.S.C. 10903(a), or upon receiving an exemption from the Commission from having to pursue formal abandonment procedures. 49 U.S.C. 10505. Moreover, a carrier may not operate over a railroad line in interstate commerce unless the Commission finds that the present or future public convenience and necessity require or permit operation of the line. 49 U.S.C. 10901(a).

2. Prior to February 24, 1992, petitioner Norfolk Southern operated a .13-mile section of rail line in downtown Charlotte, North Carolina, that had not carried local traffic for more than two years. See Pet. App. 16a, 20a. In 1990, the City of Charlotte contracted to purchase from Norfolk Southern the land on which that rail segment was located; the City

planned to construct a convention center on the property. *Id.* at 5a.[1] Norfolk Southern subsequently filed a notice of exemption to abandon the line segment in accordance with the Commission's out-of-service line class exemption from the formal abandonment requirements, 49 C.F.R. 1152.50(b).[2] See Pet. App. 5a, 16a. The exemption took effect on August 30, 1991. *Id.* at 17a, 20a.

On December 11, 1991, respondent North Carolina Railroad Company (NCRR) petitioned the ICC to revoke the exemption. Pet. App. 20a. NCRR owns a 316-mile rail line between Charlotte and Morehead City, North Carolina. *Id.* at 26a. Pursuant to a 99-year agreement executed in 1895, and subsequently amended by a 1968 lease (which was recorded in a 1969 Memorandum of Lease), NCRR leased to Norfolk Southern certain properties in downtown Charlotte. *Id.* at 5a, 23a. However, the lease was due to expire on December 31, 1994 (*id.* at 22a), and NCRR, seeking to preserve the option of connecting with Norfolk Southern in downtown Charlotte, asked the ICC to rescind the Norfolk Southern abandonment authority. *Id.* at 25a.

NCRR argued, *inter alia*, that the ICC proceedings should be reopened on the ground of changed circum-

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[1] Respondent's brief in opposition states that the section of rail line at issue in this case "has been torn out and the City has substantially completed construction of the new convention center." Br. in Opp. 7.

[2] The Commission had previously exempted such out-of-service lines from its formal abandonment procedures pursuant to 49 U.S.C. 10505. *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146, 150 (1986), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 124 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

stances. NCRR asserted that "[a]t the time of the filing of the Notice of Exemption, [the City of] Charlotte had committed itself to protect existing rail corridors." C.A. Rec. 75 (internal quotation marks omitted). NCRR further alleged that after the Commission's approval of the abandonment, the City had announced its intention to destroy the rail corridor "by tearing down the critical Stonewall Street Bridge." *Ibid.* Respondent acknowledged that "[o]rdinarily, what use is made of an abandoned right-of-way is of no concern to the Commission." *Ibid.* (citing *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984)). It contended, however, that in the present case "the commitment of Charlotte to protect the existing railroad corridors obviated the need for [NCRR], the State of North Carolina Department of Transportation or any other persons either to make an offer [to] purchase the property sought to be abandoned by [Norfolk Southern] or to seek a public use condition, allowing six-months' time to negotiate the right-of-way's acquisition." C.A. Rec. 75-76; see 49 U.S.C. 10905(c), 10906. As a result of the change in circumstances, NCRR argued, "the Commission should reopen the proceeding, nullify the exemption authorization and afford interested persons the opportunity to make an offer to purchase the property or to seek a public use condition, allowing six-month's [*sic*] time to negotiate the right-of-way's acquisition." C.A. Rec. 76.

The Commission denied NCRR's petition to revoke the exemption. Pet. App. 25a. Observing that NCRR and Norfolk Southern continue to connect at a second point north of Charlotte, the Commission found that future rail service was not jeopardized and that revocation of the exemption would be inconsistent with

the National Transportation Policy, 49 U.S.C. 10101a, which charges the Commission with promoting efficient and sound economic conditions in transportation and reducing regulatory barriers to exit. Pet. App. 25a. The Commission rejected NCRR's contention that changed circumstances necessitated reopening, concluding that NCRR had failed to demonstrate the existence of any "commitment by the City to preserve rail corridors." *Id.* at 24a. The Commission also stated that "neither [Norfolk Southern] nor the City assumed any obligation under the terms of the Memorandum of Lease, to maintain a connection with NCRR over the abandoned line. * * * NCRR's misinterpretation of the Memorandum of Lease does not provide a basis for establishing changed circumstances to reopen the proceeding." *Ibid.* The Commission's decision denying reconsideration was issued on February 18, 1992. *Id.* at 20a. NCRR did not appeal the ICC's decision, and the time to do so under the Hobbs Act, 28 U.S.C. 2344, has long since expired.

3. NCRR also filed a state court declaratory judgment action against Norfolk Southern and the City, asserting rights under state contract and property law. The complaint alleged, *inter alia*, that "NCRR has an easement implied by reservation based on pre-existing use over, across and through Lot A," Pet. App. 28a; that the real property in question was "encumbered by an equitable servitude in the nature of a railroad right of way so as to provide a continuous through connection between NCRR's line and [Norfolk Southern's] line," *id.* at 29a; that "NCRR has an implied contract with [Norfolk Southern] whereby [Norfolk Southern] agreed to maintain a continuous through track connection between NCRR's

line and [Norfolk Southern's] line," *id.* at 30a; and that "NCRR has an implied contract with the City of Charlotte whereby the City is required to maintain the existing railroad corridor or a like corridor," *ibid.* Norfolk Southern contended, *inter alia*, that the ICC had exclusive jurisdiction over NCRR's claims against Norfolk Southern. *Id.* at 6a. The trial court granted Norfolk Southern's motion for summary judgment with respect to four counts and denied it with respect to the four counts quoted above. *Id.* at 13a.[3]

Norfolk Southern appealed. The North Carolina Court of Appeals affirmed the trial court's denial of summary judgment with respect to the four counts that the trial court had allowed to go forward.[4] The court rejected Norfolk Southern's preemption argument, explaining that "[t]he cases which [Norfolk Southern] cites * * * are distinguishable from the facts in the instant case. The instant case turns on state law construction of written instruments, * * * while the I.C.C. ruling applied to the abandonment of the railroad. We therefore find that the trial court did not err in denying [Norfolk Southern's] motion to dismiss for lack of subject matter jurisdiction." Pet. App. 8a-9a. The court also held that for the

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[3] After the Commission issued its order denying reopening, Norfolk Southern moved in the trial court for leave to amend its answer to add a defense of collateral estoppel and/or res judicata. See C.A. Rec. 173-174. The trial court denied that motion without explanation. See Pet. App. 14a.

[4] NCRR cross-appealed, challenging the trial court's grant of summary judgment to Norfolk Southern with respect to the other four counts of the complaint. The North Carolina Court of Appeals dismissed the cross-appeal as interlocutory. See Pet. App. 9a-11a.

reasons set forth in its discussion of the federal pre-emption question, it "need not address" Norfolk Southern's putative collateral estoppel/res judicata defense. *Id.* at 9a. The Supreme Court of North Carolina denied further review. *Id.* at 1a-2a.

DISCUSSION

Petitioner does not purport to identify any conflict among the lower courts requiring resolution by this Court.[5] Rather, the thrust of its argument is that the instant case is squarely controlled by this Court's decision in *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). See, *e.g.*, Pet. 6-7. We disagree.

Certainly the principles announced in *Kalo Brick* are pertinent to the correct resolution of the pre-emption issues raised by respondent's suit. And we do not agree with the state court's suggestion that those principles are irrelevant simply because "[t]he instant case turns on state law construction of written instruments." Pet. App. 8a. *Kalo Brick* does not, however, hold that ICC approval of an abandonment precludes all state-law claims that are in any way related to the abandoned line or the real property on which it is located. Rather, a more nuanced inquiry is required, one that examines the nature of the asserted right and the scope of the requested remedy in order to determine whether adjudication of the state-law claim can be expected to impair the ICC's conduct of its regulatory mission. In the present case, we believe that the record in its current state is too fragmentary, and the analysis of the state court too cryptic, to facilitate review by this Court

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[5] Indeed, the petition cites no lower court cases at all, nor any decision of this Court issued after 1984. See Pet. IV-V (Table of Authorities).

at the present time. The petition for a writ of certiorari should therefore be denied.[6]

1. In *Kalo Brick*, the Court held that the ICC's approval of an abandonment precluded a subsequent damages action against the railroad for breach of a state-law "duty to furnish car service and transportation to all persons who apply." 450 U.S. at 323 (quoting *Kalo Brick & Tile Co.* v. *Chicago & N.W. Transp. Co.*, 295 N.W.2d 467, 469 (Iowa 1979)). The Court noted that "[t]he judgment as to what constitutes reasonableness belongs exclusively to the Commission," 450 U.S. at 325, and that "[a] system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." *Id.* at 326. See also *id.* at 331 ("a right to sue, with its implied threat of sanctions for failure to comply with what the courts of each State consider reasonable policies, is plainly contrary to the purposes of the Act").

Kalo Brick makes clear that the Commission's approval of an abandonment preempts any lawsuit based on a carrier's purported breach of a state-law duty to furnish reasonable service to the public generally. To allow such suits to go forward would permit state courts to revisit the very issues necessarily considered by the Commission in approving the abandonment. See 450 U.S. at 326 (noting that

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[6] A further consideration militating against review at this time is that Congress is currently embarked upon a major overhaul of the Interstate Commerce Act and the Interstate Commerce Commission. What effect this will have upon the continuing significance of the issues raised by the case at hand cannot be predicted at present.

plaintiff's state-law causes of action were "essentially attempts to litigate the issues underlying [the] abandonment of the * * * line"); *id.* at 331-332 ("We hold that the Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated carrier when the Interstate Commerce Commission, in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court."). As this Court recognized in *Kalo Brick*, such a regime would be entirely "at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." *Id.* at 326.[7]

2. Contrary to petitioner's submission, however, we believe that the present case is distinguishable from *Kalo Brick* in two significant respects.

NCRR does not assert that Norfolk Southern has breached a duty to provide rail service, either to itself or to the public at large; nor does it rely on

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[7] *Kalo Brick* also suggests that if the issues presented were otherwise suitable for immediate disposition by this Court, the current interlocutory posture of the case would not deprive the Court of jurisdiction under 28 U.S.C. 1257(a), which permits review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." *Kalo Brick* came to this Court in a procedural posture essentially identical to that presented here: an intermediate state court had held that the plaintiff's suit was not preempted and had remanded the case for trial, see *Kalo Brick & Tile Co.* v. *Chicago & N.W. Transp. Co.*, 295 N.W.2d 467, 469-472 (Iowa 1979), and the state supreme court had denied discretionary review. See 450 U.S. at 317. See also *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-498 n.5 (1983). Of course, to the extent that the current interlocutory posture renders the legal issues unclear or impedes this Court's ability to decide the case, it is obviously relevant to the decision whether to grant certiorari at this stage.

generalized notions of "reasonable service." It argues instead that Norfolk Southern has breached a non-rail-service obligation (grounded in state contract and property law), voluntarily assumed, to NCRR itself. In *Kalo Brick* the Court distinguished its prior decision in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915), on the ground that in *Puritan* "the matters presented to the state courts for decision involved no questions of law or questions calling for an administrative judgment, and, in particular, no issue as to the reasonableness of the carrier's policies. * * * Instead, the state court was called upon to decide only the factual question whether the railroad had carried out the duties that it had agreed to undertake." 450 U.S. at 329. Cf. *American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817, 824 (1995) (although Airline Deregulation Act preempts enforcement of state regulatory requirements, it does not "shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings").

This is not to say that state-law breach of contract actions can never be preempted by the Commission's authorization of an abandonment. If a state-law contract suit (whether seeking damages or specific performance) has the purpose or practical effect of compelling the resumption of railroad service over a line that the Commission has permitted to be abandoned, we believe that federal law prevents the action from going forward. We therefore do not agree with the North Carolina Court of Appeals' suggestion that the principles announced in *Kalo Brick* are irrelevant simply because "[t]he instant case turns on state law construction of written instruments." Pet. App. 8a.

In the present case, however, it is far from clear that NCRR's suit is properly characterized as a challenge to Norfolk Southern's abandonment of the line. Rather, NCRR's principal grievance appears to concern the construction of a convention center on the real property in question (which has destroyed the railroad corridor, making it unavailable for use in the future) rather than the cessation of railroad service or the dismantling of Norfolk Southern's tracks. Thus, NCRR states that it "initiated this proceeding to determine its contractual and property rights concerning the railroad right of way over the Subject Property." Br. in Opp. 14. Respondent states as well that it "has never asked the court to mandate a railroad service connection between Respondent's southern terminus and Petitioner's interstate line," *id.* at 12; that its "claims in this case do not concern provision of railroad service," *id.* at 17; and that it "does not seek any remedy inconsistent with the ICC's order allowing abandonment," *ibid.* Similarly in the court of appeals, NCRR asserted that

> contrary to [Norfolk Southern's] contentions, NCRR does not seek to reverse the ICC's approval of [Norfolk Southern's] abandonment. Rather, the only issues in this case are (a) what contractual obligations [Norfolk Southern] has to NCRR to preserve the real estate corridor and (b) what real property interests NCRR has in the corridor. These issues were not (and could not have been) part of the administrative proceedings before the ICC. What NCRR seeks is a declaration concerning connection of the rights of way and preservation of the physical integrity of the rights of way.

NCRR C.A. Br. 16. See also *id.* at 9 ("NCRR does not * * * construe [the 1968 lease] to require, or

attempt in this action to obtain, the use of [Norfolk Southern's] tracks. The 1968 Lease * * * simply describes the continuous real property corridor created by the connection of the [Norfolk Southern] and NCRR rights of way (i.e. the connection of two parcels of real property).").[8]

If NCRR's complaint is construed to challenge only the destruction of the railroad corridor, this case would appear to be governed primarily not by *Kalo Brick* but by *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), which holds that state law rules governing the use of real property *after* a railroad line has been abandoned are generally not preempted by federal law. The Court in *Hayfield* recognized that the relevant provisions of the Interstate Commerce Act "relate to requirements that must be met *before* the Commission will authorize an abandonment" and that "as a general matter, issuing a certificate of abandonment terminates the Commission's jurisdiction." 467 U.S. at 633. Moreover, if the North Carolina courts in this case ultimately were to enter a final judgment that petitioner believes to be inconsistent with the Commission's authorization of abandonment, this Court will of course be free to consider whether review is warranted at that time.

3. Petitioner acknowledges that "Commission authority over a carrier's right of way diminishes or

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[8] Before the Commission as well, NCRR focused on the destruction of the rail corridor (rather than on the cessation of railroad service or the dismantling of Norfolk Southern's tracks) and characterized its request for reopening as resting on an exception to the general principle that "[o]rdinarily, what use is made of an abandoned right-of-way is of no concern to the Commission." C.A. Rec. 75.

ceases after abandonment, and carriers might have post-abandonment contractual obligations and property rights that are justiciable as matters of ordinary contract and property law." Pet. 11. It asserts, however, that the present suit is as a practical matter "an attempt to have the North Carolina courts undo the Commission's authorization for petitioner's abandonment of its former track in Charlotte." Pet. 9. Respondent, for its part, takes pains to disavow any intent to challenge the abandonment of the line or to seek an order compelling the resumption of railroad service. See, *e.g.*, Br. in Opp. 12, 14, 17, 17-18. Thus, to a large extent the dispute between the parties centers not on the applicable legal principles but on the proper characterization of respondent's claims. This Court will be better able to assess the significance and proper resolution of the preemption question after the state courts have determined whether, and on what legal theory, respondent is entitled to relief. In light of the fragmentary record, the current interlocutory posture of the case, and the cursory treatment of the preemption question by the North Carolina Court of Appeals, we believe that review by the Court at the present time would be premature.[9]

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[9] This case is complicated somewhat by the fact that NCRR, while acknowledging that "[o]rdinarily, what use is made of an abandoned right-of-way is of no concern to the Commission," C.A. Rec. 75, argued that the ICC should reopen the abandonment proceedings based on the City's announced intention to destroy the railroad corridor after the abandonment had taken place. See pages 3-4, *supra*. In denying reopening, the Commission expressed disagreement with NCRR's construction of the 1968 lease and with NCRR's characterization of certain representations made by City officials. Pet. App. 23a-24a. Thus, although questions concerning

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the uses to which real property will be put after abandonment are not usually germane to the Commission's abandonment decision, the Commission in this case expressed a view with respect to some (though not all) of the arguments asserted by NCRR in the state court proceedings. In our view, the preclusive effect of that Commission pronouncement is best determined by reference to principles of res judicata and collateral estoppel rather than federal preemption. Cf. *Hayfield*, 467 U.S. at 636 n.15. After the Commission issued its order denying reopening, Norfolk Southern moved for leave to amend its answer to add a defense of collateral estoppel and/or res judicata, see C.A. Rec. 173-174; the trial court denied that motion without explanation, see Pet. App. 14a, and the North Carolina Court of Appeals held that it "need not address" the issue in light of its resolution of the preemption question. *Id.* at 9a; see Pet. 14 n.5. Although we have doubts as to the correctness of the state courts' holdings on this score, petitioner does not challenge those rulings in this Court, and we do not believe that the issue merits this Court's review in the present posture of the case.

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No. 94-464

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THE NORTH CAROLINA RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

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REPLY TO BRIEFS IN OPPOSITION

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12pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. Reply to NCRR	2
B. Reply to United States	5

TABLE OF AUTHORITIES

CASES — Page

Abandonment of R.R. Lines—Use of Opportunity Costs, 360 I.C.C. 571 (1979), *aff'd sub nom. Farmland Indus., Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981) 8
Alabama Pub. Serv. Comm'n v. *Southern Ry.*, 341 U.S. 341 (1951) 1
Alabama & Vicksburg Ry. v. *Jackson & E. Ry.*, 271 U.S. 244 (1926) 1
American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995) 4, 9
Burke County v. *United States*, 206 F. Supp. 586 (S.D. Ga. 1962) 5
Cartersville Elevator, Inc. v. *ICC*, 735 F.2d 1059 (8th Cir. 1984) 8
Central New England Ry. v. *Boston & Albany R.R.*, 279 U.S. 415 (1929) 5
Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 4, 7
Colorado v. *United States*, 271 U.S. 153 (1926) 1, 4
Glosemeyer v. *Missouri-Kan.-Tex. R.R.*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) 7
Gulf, Mobile & Ohio R.R. v. *Illinois Cent. R.R.*, 225 F.2d 816 (5th Cir. 1955), *cert. denied*, 350 U.S. 932 (1956) 5
Hayfield N.R.R. v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) 9
Illinois Cent. R.R. v. *DeFuentes*, 236 U.S. 157 (1915) 1
Iowa Power, Inc.—Constr. Exemption—Council Bluffs, IA, 8 I.C.C.2d 858 (1990) 7
Moeller v. *ICC*, 201 F. Supp. 583 (S.D. Iowa 1962) 5
Norfolk & W. Ry. v. *American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) 10
Norfolk & W. Ry.—Abandonment Between St. Mary's & Minister, 9 I.C.C.2d 1015 (1993) 7
Palmer v. *Massachusetts*, 308 U.S. 79 (1939) 1
Preseault v. *ICC*, 494 U.S. 1 (1990) 6, 7

TABLE OF AUTHORITIES—Continued

Page

PSI Energy, Inc.—Feeder Line Dev.—Norfolk S. Corp. Line Between Cynthiana & Carol, IN, 7 I.C.C.2d 227 (1991) 7
Rail Abandonments—Use of Rights-of-Way as Trails, 5 I.C.C.2d 370 (1989) 7
Runyon v. *Paley*, 416 S.E.2d 177 (N.C. 1992) 3
San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 3
Transit Comm'n v. *United States*, 289 U.S. 121 (1933) 1
Village of Mantorville v. *Chicago Great W.R.R.*, 8 F. Supp. 791 (D. Minn. 1934) 4
Western Pac. R.R. v. *Nevada-Cal.-Or. Ry.*, 40 F.2d 731 (N.D. Cal. 1930) 5

STATUTES AND REGULATIONS

49 U.S.C. § 10901(a)(1)-(2) 6
§ 11341(a) 9
49 C.F.R. § 1152.33(p) 8

REPLY TO BRIEFS IN OPPOSITION

The question squarely presented in this case is whether the Interstate Commerce Act ("ICA") preempts a state court action to determine "whether the rail line of an interstate rail carrier must connect with the line of another railroad," when the Interstate Commerce Commission ("ICC") has authorized abandonment of the connecting tracks at issue. Pet. I. In this case, contrary to the principles established in *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), and a long line of consistent holdings by this Court,[1] the North Carolina courts have asserted jurisdiction to impose on Norfolk Southern, under various state-law implied contract and property theories, liability for Norfolk Southern's decision to carry out a rail line abandonment that the ICC has expressly authorized. Review of the judgment below is necessary to preserve the vitality—and clarity—of the *Kalo Brick* rule, and to prevent states (and state courts) from regulating whether and when interstate railroads may lawfully abandon rail trackage.

Both Respondent North Carolina Railroad Company ("NCRR") and *amicus curiae* United States oppose review of the state court's judgment in this case, albeit on different (and inconsistent) grounds. NCRR argues that its state-law claims do not conflict with the ICC's abandonment order because it seeks only declaratory relief (and, possibly, damages) rather than an injunction, and

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[1] *See, e.g., Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951); *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939); *Colorado* v. *United States*, 271 U.S. 153 (1926); *see also Transit Comm'n* v. *United States*, 289 U.S. 121 (1933) (ICA preempts state-imposed requirement that railroad grant another carrier access to its tracks and terminal facilities); *Alabama & Vicksburg Ry.* v. *Jackson & E. Ry.*, 271 U.S. 244 (1926) (ICA preempts state-imposed requirement that railroad establish and maintain physical connection and junction with another carrier); *Illinois Cent. R.R.* v. *DeFuentes*, 236 U.S. 157 (1915) (striking down state-imposed requirement that railroad switch cars for another carrier at a point of interchange between carriers).

because its claims arise out of contract and property obligations voluntarily assumed by Norfolk Southern. These assertions fundamentally mischaracterize NCRR's *own* complaint. The government, not surprisingly, does not join NCRR's theory nor, for that matter, does it even defend the rationale of the state courts. Rather, the government finds no conflict between NCRR's claims and the ICC's abandonment order by misconstruing the latter as authorizing *only* the cessation of railroad service by Norfolk Southern over the affected rail line. But, under the ICC's own regulations and uniform decisions of this and other courts, an ICC order authorizing abandonment of a rail line is an express determination that the abandoning railroad is permitted not only to cease service over the affected line but also to terminate the right-of-way and convert the underlying property to *non*-rail uses. Unquestionably, NCRR's claims would impose liability on Norfolk Southern for doing precisely that, and would do so *solely* because of the line's prior status as an operating rail line. The conflict with *Kalo Brick* is direct, substantial and irreconcilable.

A. Reply to NCRR

1. NCRR argues that its claims do not conflict with the ICC's abandonment order because NCRR seeks only declaratory relief (and thereafter, economic damages), and has "never demanded reconstruction or reconnection of the rail line abandoned" by Norfolk Southern. Opp. 8-10. This assertion is inaccurate. NCRR's complaint sought a declaration of its right, title and interest in the properties at issue, including Norfolk Southern's rail line. Pet. App. 31a. In addition, however, NCRR also expressly requested entry of a state court "order" forbidding Norfolk Southern from interfering with NCRR's alleged rights, including the use of an alleged easement and railroad right-of-way over Norfolk Southern's property and a "continuous through track connection" between NCRR's rail line and Norfolk Southern's rail line in downtown Charlotte. *Id.* at 28a-31a. The requested order is no different from a permanent injunction requiring Norfolk

Southern to provide and maintain the requested right-of-way and track connection over the very line segment that was the subject of the ICC-approved abandonment.[2]

In any event, NCRR's purported distinction between injunctive relief and damages is wholly illusory. The threat of state-imposed damages can and does frustrate federal authority as severely as state court-ordered injunctive relief. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief"). Indeed, the Court's controlling decision in *Kalo Brick* involved a state court action for damages, *not* a request for injunctive relief. Thus, NCRR's claim that it seeks only declaratory relief and, possibly, economic damages, does not remove the inherent conflict between its claims and the ICC's authority.

2. NCRR also argues that its suit involves only "well-established precedent" holding that abandonment does not extinguish a railroad's prior contractual obligations and property rights. Opp. 13. This case, however, does not involve routine contractual obligations or property rights *voluntarily* undertaken by the parties. To the contrary, NCRR's routine contract claims have been *rejected* both by the ICC and by the North Carolina courts. In the abandonment proceedings before the ICC, NCRR expressly raised—and the ICC considered and rejected—the claim that Norfolk Southern's proposed line abandonment would breach alleged contractual commitments to preserve the rail corridor and to maintain a "continuous through track connection" between NCRR and Norfolk Southern. Pet. App. 23a-24a.

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[2] In addition, under North Carolina law, the *only* permissible remedy for NCRR's "equitable servitude" claim (Pet. App. 29a) is an equitable injunction; damages are unavailable unless the claimant establishes the stricter requirements for a real covenant "at law." *See Runyon* v. *Paley*, 416 S.E.2d 177, 188-89 (N.C. 1992). Thus, NCRR's assertion in this Court that it does not seek reconnection of these rail lines is utterly inconsistent with its own complaint.

The North Carolina trial court similarly found NCRR's *express* contract and property claims to be without merit, and granted summary judgment for Norfolk Southern on these four counts (*id.* at 12a-13a), an action which the state appeals court declined to review (*id.* at 11a). Thus, the only claims before this Court involving Norfolk Southern, and the only claims as to which the state courts improperly rejected Norfolk Southern's claim of preemption, are those based on various *implied* contract and property claims. *All* of these claims are based on Norfolk Southern's prior operation of a rail line on the property at issue. Thus, the prior operation and abandonment —as regulated and authorized by the ICC—are the central factual elements of NCRR's state law claims. NCRR's claims involve "mere artful pleading" that is insufficient to avoid federal preemption. *Kalo Brick*, 450 U.S. at 324.

Nor can NCRR's surviving "implied" claims be characterized as being based on a "contractual commitment voluntarily undertaken." *Cf. American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817, 824 (1995) (quoting *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2612 (1992) (plurality opinion)). These implied claims—if they have any substance at all—are properly regarded as state-created duties imposed for the purpose of advancing various public policies (such as state land use policies). Thus, NCRR's assertion that this case is governed by "well-established precedent" governing rail carriers' prior contractual obligations is unfounded.

3. Even if NCRR's implied claims were viewed as "routine" contract claims, the weight of authority indicates that the ICC's authorization of Norfolk Southern's abandonment would preempt NCRR's claims based on inconsistent contractual obligations,[3] although there is

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[3] *See, e.g., Colorado* v. *United States*, 271 U.S. 153, 165 (1926) ("even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce"); *Village of Mantorville* v. *Chicago Great W.R.R.*, 8 F. Supp. 791 (D. Minn. 1934) (preempting contract action that would "require the de-

some authority to the contrary.[4] This Court in *Central New England Railway* v. *Boston & Albany Railroad*, 279 U.S. 415 (1929), expressly left open the issue.[5] In this case, the Court could resolve this conflict with a definitive ruling that an abandonment order by the ICC preempts contract claims that are inconsistent with, or that effectively would preclude, the ICC-authorized abandonment.[6]

B. Reply to United States

1. The government's position opposing the grant of *certiorari* in this case is based primarily on a single fundamental error: While acknowledging that the ICC's exercise of abandonment authority preempts inconsistent state-law actions (including actions founded upon written

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fendant to refrain from doing that which the [ICC] stated it might do"); *Western Pac. R.R.* v. *Nevada-Cal.-Or. Ry.*, 40 F.2d 731 (N.D. Cal. 1930) (abandonment authorization relieved railroad of contractual liability to connecting railroad); *Burke County* v. *United States*, 206 F. Supp. 586 (S.D. Ga. 1962); *Moeller* v. *ICC*, 201 F. Supp. 583 (S.D. Iowa 1962).

[4] *Gulf, Mobile & Ohio R.R.* v. *Illinois Cent. R.R.*, 225 F.2d 816, 821-22 (5th Cir. 1955) (ICA does not preempt a railroad's contractual liability for trackage lease payments, where the ICC abandonment order does not expressly address the issue), *cert. denied*, 350 U.S. 932 (1956).

[5] In *Central New England*, the ICC authorized abandonment of a portion of a rail line, and the carrier sought to rely on this authority as a defense to payment of rent for an *adjacent* portion of the line (for which no abandonment authority had been granted). The Court held that because the ICC had not addressed the issue of rental payments on the adjacent line, its decision could not be read to preempt the contractual obligation. The Court pretermitted whether "a proper order of the Commission" (such as the ICC's order in this case specifically rejecting NCRR's contract theory) could extinguish prior contractual obligations. *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415, 419-20 (1929).

[6] The government supports this view of the law. *See* Brief for the United States as *Amicus Curiae* at 10 ("U.S. Br.") (a state-law contract suit seeking damages or specific performance *is* preempted if it "has the purpose or practical effect of compelling the resumption of rail service" on a line approved for abandonment).

contractual undertakings), and that the state court below erred in reaching a contrary conclusion (U.S. Br. 7, 10), the government denies that there is any conflict in this case between the ICC's order authorizing Norfolk Southern to abandon the line and NCRR's civil suit. This is clearly wrong. In the government's view, NCRR's action does not intrude on the ICC's abandonment order because NCRR is not seeking to restore "railroad service" (which the government says the ICC authorized Norfolk Southern to cease), but only the preservation of the abandoned line as a railroad right-of-way or corridor for possible future rail use. U.S. Br. 10-11. The government's argument thus construes the ICC's abandonment order as having authorized the cessation of railroad service over the involved rail line, but not the termination of the railroad right-of-way and conversion of the corridor to non-rail uses.

The government's argument, however, inexplicably confuses what this Court several terms ago characterized as "the *important distinction*" between the complete "abandonment" of a rail line, and the more limited "discontinuance" of service on the line. *Preseault* v. *ICC*, 494 U.S. 1, 5-6 n.3 (1990) (emphasis added). In confusing these concepts, the government understates the scope and resulting preemptive effect of the ICC's abandonment order in this case.

The express language of the ICA provides that a rail carrier may not "discontinue" rail transportation operations on a rail line (49 U.S.C. § 10901(a)(2)), *nor* may it "abandon" the line itself, without ICC approval (49 U.S.C. § 10901(a)(1)). The statute makes clear that "discontinuance" and "abandonment" are separate concepts. A railroad authorized to "discontinue" operations may suspend service to shippers on the line until further notice, but may be required to resume service if and when the ICC determines that the public convenience and necessity require it. Therefore, a railroad authorized to "discontinue" operations on a line may *not* take actions—such as transferring or relinquishing its right-of-

way or converting the underlying property to non-rail uses—that would preclude eventual resumption of service on the line. By contrast, the grant of full abandonment authority under § 10903 completely and permanently extinguishes a railroad's common carrier obligation to maintain and provide service on the line. Only after final abandonment authority is granted may a railroad remove its rail assets (such as railroad track and ties) and transfer or sell the underlying right-of-way.[7]

In this case, the government's brief overlooks this critical distinction by effectively treating the ICC's abandonment order as having authorized only the discontinuance of Norfolk Southern's *service* obligations. The government notes correctly that one of the state law claims deemed to be preempted in *Kalo Brick* was based on a state statutory duty to provide rail *service* to shippers on request. U.S. Br. 8; 450 U.S. at 323. Focusing on this fact, the government attempts to distinguish the instant case by noting that NCRR has not expressly alleged that Norfolk Southern has breached a duty to provide rail *service*, as such. Instead, according to the government, NCRR's claims focus only on Norfolk Southern's failure to preserve its railroad right-of-way and maintain its railroad track connection with NCRR's rail line. The government argues that this alleged "non-rail-service obligation" is fundamentally different from the duty alleged in *Kalo Brick*, because it is "voluntarily assumed" and "grounded in state contract and property law." U.S. Br. 10.

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[7] The fundamental distinction between abandonment authorization and discontinuance-of-service authorization has been recognized by the ICC and courts in many cases. *See, e.g., Preseault* v. *ICC*, 494 U.S. 1 (1990); *Glosemeyer* v. *Missouri-Kan.-Tex. R.R.*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); *Norfolk & W. Ry.—Abandonment Between St. Mary's & Minister*, 9 I.C.C.2d 1015 (1993); *PSI Energy, Inc.—Feeder Line Dev.—Norfolk S. Corp. Line Between Cynthiana & Carol, IN*, 7 I.C.C.2d 227 (1991); *Iowa Power, Inc.—Constr. Exemption—Council Bluffs, IA*, 8 I.C.C.2d 858 (1990); *Rail Abandonments—Use of Rights-of-Way as Trails*, 5 I.C.C.2d 370 (1989).

In fact, the obligation of an interstate rail carrier to maintain its right-of-way and track connections is neither voluntary, nor is it grounded in state law. Until the ICC authorized the complete and final *abandonment* of the tracks at issue (as distinguished from authorization to discontinue service over the tracks), Norfolk Southern was obligated by *federal* law to maintain its right-of-way for possible resumption of rail service. NCRR contested the ICC's grant of abandonment authority; NCRR was free to argue that the ICC should have granted discontinuance authority instead—thereby preserving the right-of-way and tracks, and achieving precisely the same remedy NCRR now seeks in state court. By granting Norfolk Southern's request for *full* abandonment authority, however, the ICC determined that continued maintenance of these tracks would *not* further the national rail transportation policy, and was *not* necessary to permit future rail service by NCRR or any other operator. NCRR's attempt to force a contrary conclusion through state court litigation clearly invades the plenary and exclusive authority of the ICC to review and approve rail abandonments—including its authority to require the continued maintenance of right-of-way and track connections, or in its discretion, to permit their abandonment.[8]

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[8] The scope of the ICC's authority over the maintenance or abandonment of right-of-way and track connections is confirmed by the ICC's judicially-approved abandonment regulations, which expressly contemplate the ICC's consideration of the "opportunity costs" of rail assets that could be deployed more profitably in alternative *non*-rail uses. 49 C.F.R. § 1152.33(p); *see Abandonment of R.R. Lines—Use of Opportunity Costs*, 360 I.C.C. 571 (1979), *aff'd sub nom. Farmland Indus., Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981); *Cartersville Elevator, Inc.* v. *ICC*, 735 F.2d 1059 (8th Cir. 1984). The ICC properly considers these costs in determining whether continued operation and dedication of a line to railroad uses unduly burdens interstate commerce. A state court action precluding Norfolk Southern from profitably deploying its assets, or subjecting it to money damages for doing so, would similarly burden interstate commerce.

In short, contrary to the impression conveyed by the government, the ICC's abandonment order in this case expressly authorized Norfolk Southern not only to cease active rail service over the line at issue, but also to terminate the right-of-way and convert the underlying property to productive *non*-rail use. NCRR's action, if allowed to proceed, would plainly impose liability on Norfolk Southern, and thus penalize it, for doing exactly what the ICC has authorized it to do. The conflict with the ICC's abandonment authorization is direct and substantial.

2. The government's conclusions are not supported by *Hayfield Northern Railroad* v. *Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984). In that case, after an ICC-approved abandonment had been completed, a newly-formed railroad company condemned and acquired the abandoned railroad property, using eminent domain powers generally applicable to any privately-owned property. *Id.* at 632. In this case, however, NCRR's claims are ultimately based on Norfolk Southern's *prior* use and subsequent abandonment of the property at issue as a railroad right of way. *Hayfield* does not support such claims. See *id.*, at 633 n.11 (Court's ruling "does not mean that in the postabandonment period, States are free to undo the very purposes for which the Commission authorized an abandonment").

3. The ICC's plenary authority in regulating rail abandonments sharply distinguishes this case from *American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817 (1995). In that case, the Court held that Congress did not intend to preempt all state law contract claims when it enacted an express preemption clause providing that "no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier." See *id.* at 825. In this regard, the preemptive effect of an ICC abandonment order is more closely analogous to the express statutory preemption under 49 U.S.C. § 11341(a), which provides that participants in ICC-approved mergers and consolidations are "exempt from the antitrust laws and

from all other law, including State and municipal law" as necessary to complete the transaction. The Court has held that this provision *does* override state contract law, permitting carriers to avoid obligations under collective bargaining agreements that would impede the ICC-approved transaction. *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991).[9]

4. The concerns at issue in this case arise frequently in cases involving rail abandonments in communities throughout the United States. Individual states and local interests naturally seek to preserve local rail service. Absent clear reaffimation of *Kalo Brick*, local interests will assert a wide range of implied state law property and contract claims designed to frustrate rail line abandonments approved by the ICC. In order to protect and preserve the ICC's exclusive authority in this area, the Court should grant certiorari and reverse the decision of the Court of Appeals of North Carolina asserting jurisdiction in this case.

Respectfully submitted,

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[9] The pendency of legislative proposals amending the ICA (U.S. Br. 8 n.6) does not undermine the importance of this case or the need for review by this Court. It is impossible to predict at this time whether Congress will enact such legislation or what form that legislation might take.